

SUPREMACY

MARSHALL

ON WHEELS

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9338.

PEOPLES BANK, *Appellant,*

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S.
SZYMCZAK, JOHN K. McKEE, ERNEST A.
DRAPER AND RUDOLPH M. EVANS, *Appellees.*

Appeal from the District Court of the United States for the
District of Columbia.

JOINT APPENDIX.

**Complaint for Declaratory Judgment and Incidental
Injunctive Relief**

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Filed Dec 24 1945

In the District Court of the United States

For the District of Columbia

No. Civil 32200

PEOPLES BANK, *Plaintiff,*

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST G. DRAPER AND RUDOLPH M.
EVANS, *Defendants.*

The plaintiff, for its complaint, alleges:

I. Jurisdiction is founded on the existence of a Federal question and amount in controversy.

The action arises under the Constitution of the United States, Article I, §§ 1 and 8, and the Fifth Amendment to the Constitution of the United States, and under § 9 of the Federal Reserve Act as amended (12 U. S. C. §§ 321-328, inclusive), and under Section 12B of the Federal Reserve Act, as amended (12 U. S. C. § 264), as hereinafter more fully appears, and under the Act of June 14, 1934, Chapter 512, 48 Stat. 955 as amended (28 U. S. C. § 400), known as the Federal Declaratory Judgment Act. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three thousand dollars.

II. Plaintiff is and at all times herein mentioned has been a state banking corporation organized and existing under the laws of the state of California, with its principal place of business in Lakewood Village, Los Angeles County, State of California. Plaintiff on or about May 15, 1942 became and still is a member of the

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Federal Reserve System and an insured bank (Federal Reserve Act, as amended, §§ 9, 12B(e)(2); 12 U. S. C. §§ 321, 264(e)(2)).

III. The defendant Marriner S. Eccles is and at all times herein mentioned was a member and Chairman, the defendant Ronald Ransom is and at all times herein mentioned was a member and Vice Chairman, and the defendants M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans are and at all times herein mentioned were members of the Board of Governors of the Federal Reserve System and all have their offices in the District of Columbia, and, with the exception of Rudolph M. Evans, who resides in Virginia, all reside in the District of Columbia.

IV. Although the above named defendants have purported to act in their official capacity as the Board of Governors of the Federal Reserve System in the matters and respects hereinafter set forth with regard to a certain condition of membership affecting the plaintiff, hereinafter alleged, said defendants have acted and are acting in respect of such matters without authority of law and in violation of the Constitution and Statutes of the United States. Consequently, said defendants cannot justify such acts by virtue of their official positions and they are subject to be sued and are sued herein personally.

3 V. On or about November 28, 1941, plaintiff, being in all respects qualified and eligible for membership in the Federal Reserve System and desiring to become a member thereof, made application to the Board of Governors of the Federal Reserve System (hereinafter sometimes called the "Board"), pursuant to such rules and regulations as had then been prescribed, for the right to subscribe to the stock of the Federal Reserve Bank of San Francisco, which was and is the Federal reserve bank organized within the Twelfth Federal Reserve District, within which plaintiff was then and is now located.

VI. Thereafter, and on or about May 6, 1942, the Board approved the said application and permitted the plaintiff to become a stockholder of the Federal Reserve Bank of San Francisco and a member bank.

VII. Upon information and belief, in considering and approving said application, the Board, as required by 12 U. S. C. §§ 322 and 264(e)(2) and (g), took into consideration the financial condition and history of the plaintiff, the general character of its management, whether or not the corporate powers exercised by it were consistent with the purposes of Chapter 3 of Title 12 of the United States Code, the adequacy of plaintiff's capital structure, its future earnings prospects and the convenience and needs of the community to be served, and found the plaintiff Bank to be fully qualified and eligible for membership in the Federal Reserve System.

VIII. Notwithstanding the findings of said Board as alleged in the preceding paragraph hereof, the defendants, purporting to act in their official capacity as said Board, but acting in excess of any powers conferred by law upon them or upon said Board and wholly without authority of law, purported to subject the plaintiff's membership in the Federal Reserve System to a certain condition, and they prescribed the same as follows, to-wit:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

IX. Said Condition No. 4 was and is arbitrary, unreasonable, capricious, discriminatory, ultra vires the authority of the Board; null and void, and no power has been conferred upon the Board or these defendants to exact of the plaintiff or any other applying bank such a condition to ownership of stock in a Federal reserve bank, or to membership in the Federal Reserve System. The attempted subjection of this plaintiff to said Condition No. 4 constitutes an abuse of power and attempted usurpation by the defendants of powers vested solely in the Congress of the United States by Article I, §§ 1 and 8 of the Constitution of the United States, and any action pursuant to said void Condition No. 4 taken for the purpose of effecting a cancellation of plaintiff's stock in the Federal Reserve Bank of

San Francisco or of terminating the membership of
 5 the plaintiff in the Federal Reserve System and any other action taken by defendants pursuant to said Condition No. 4 would constitute a taking of plaintiff's property without due process of law in violation of plaintiff's rights under the Fifth Amendment of the Constitution of the United States, and would be in violation of the provisions of the Federal Reserve Act, as amended, and more particularly of §§ 264, 321 to 328, inclusive, and 330 of Title 12 of the United States Code.

X. Plaintiff, upon becoming a member bank of the Federal Reserve System, became an insured bank under and by virtue of the provisions of § 12B of the Federal Reserve Act as amended, subsection (e)(2) (12 U. S. C. § 264 (e)(2)) and has at all times since remained an insured bank and entitled to all of the benefits of said section; and upon the termination of its membership in the Federal Reserve System the plaintiff would in law lose its status as an insured bank and the benefits of said § 12B (§12B of the Federal Reserve Act as amended), subsection (i)(2), 12 U. S. C. § 264 (i)(2), and such loss would render the plaintiff unable lawfully and advantageously to pursue its functions as a bank and to conduct its operations to the

advantage of its stockholders and the public served by it under supervision according to law. Said Condition No. 4 purports to work a forfeiture of membership of the plaintiff Bank in the Federal Reserve System for a cause which does not in law constitute a ground of forfeiture and said condition is therefore void and of no legal effect. Said Condition No. 4 is void for the further reason that it purports to work a forfeiture of plaintiff's membership in the Federal Reserve System and to deprive plaintiff of the benefits of the provisions of the Federal Reserve Act on account of acts and transactions of individuals over which plaintiff has no power or control. In the attempted subjection of plaintiff to the operation of said condition the defendants have acted in excess and in abuse of the powers conferred upon them by law as members of said Board and in violation of obligations specifically imposed upon the Board and upon them in that § 12B(y) of the Federal Reserve Act as amended provides that the purpose of § 12B is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section.

XI. On or about February 17, 1944, without the assistance or prior knowledge of plaintiff, said Transamerica Corporation acquired 500 shares out of the total of 5,000 shares of the capital stock of plaintiff, and said shares were transferred into the name of and issued to said Transamerica Corporation. Thereafter, without the assistance or prior knowledge of plaintiff, said Transamerica Corporation acquired an additional 40 shares of its capital stock, which was registered in the name of Transamerica Corporation on December 20, 1944, making a total of 540 shares of plaintiff's capital stock now owned and held by Transamerica Corporation in its own name.

XII. Upon information and belief, the acquisitions of said shares by Transamerica Corporation were made without the written approval of the defendants or the Board

and fall within the purview of the above quoted Condition No. 4.

XIII. On or about April 4, 1944, plaintiff notified the Board of the acquisition of said 500 shares of stock of plaintiff by Transamerica Corporation, and thereafter plaintiff notified the Board of the acquisition of said 40 shares of stock of plaintiff by Transamerica Corporation.

XIV. Thereafter and on or about the 4th day of December, 1945, the plaintiff made demand upon the Board through its General Counsel at Washington, D. C., that said Condition No. 4 be cancelled and thus eliminated as a continuing threat to the continued membership of the plaintiff in the Federal Reserve System. Said demand has not been complied with; said condition has not been cancelled; and in the absence of the relief demanded in this complaint, plaintiff is under the continuing necessity of conducting its business and making substantial commitments for the future in the course of such business subject to the constant and continuing threat of great and incalculable losses which will be suffered, upon any attempt being made, pursuant to the terms of said illegal and unauthorized Condition No. 4, to deprive it of its membership in the Federal Reserve System and the advantages incidental thereto. By reason of the existence of a purported power in the Board derived from the unlawful action of these defendants, as aforesaid, to terminate its existing status at will, and notwithstanding full compliance by the plaintiff with all provisions of law and all lawful regulations and conditions governing its right to remain a member bank and an insured bank, the plaintiff is at all times at great disadvantage and subjected to continuous injury in dealing with its clients and serving its patrons who are desirous of establishing banking relations with it upon a permanent basis.

8 XV. The Board and the defendants have at all times maintained and contended that said Condition No. 4 is valid and enforceable against the plaintiff and empowers them to effectuate the termination of plaintiff's membership in the Federal Reserve System and to deprive the plaintiff of the benefits incidental to such membership.

XVI. Upon information and belief, in the absence of the relief sought by this complaint, the defendants intend to and will take proceedings predicated on said Condition No. 4, designed to deprive the plaintiff of its membership in the Federal Reserve System and all the benefits thereof, and such proceedings and the constant and continuing threat thereof prior to the actual institution thereof have caused and will continue to cause great and irreparable injury and damage to the plaintiff. Upon information and belief, the initiation of such proceedings is imminent.

XVII. The plaintiff has at all times complied with the requirements of § 324 of Title 12 of the United States Code and the other pertinent statutes of the United States and the lawful rules, regulations and conditions of the Board, and is entitled under said statutes and regulations to retain its membership in the Federal Reserve System, and is desirous of so retaining said membership, and it has ever intended and now intends to do all things necessary to retain said membership and to avoid lawful forfeiture thereof.

XVIII. By reason of the premises, there exists between the parties to this action an actual justiciable controversy within the purview of the Declaratory Judgment Act, § 400 of Title 28 of the United States Code, and the plaintiff is entitled to have its rights in this action adjudged and declared therein.

XIX. The plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands that the Court adjudge, decree and declare:

1. The rights and legal relationships of the plaintiff and the defendants in the premises.

2. That said Condition No. 4, hereinabove set forth, is unauthorized by law and beyond the power of said defendants or any of them to impose or enforce, and is invalid, null and void.

3. That the defendants and each of them, and the officers, attorneys and agents of each of them, be permanently restrained from the enforcement of said condition, or from taking any steps predicated thereon to effectuate the termination of plaintiff's ownership of stock in the Federal Reserve Bank of San Francisco or the termination of plaintiff's membership in the Federal Reserve System.

4. That the defendants and each of them, and the officers, attorneys and agents of each of them, be restrained pendente lite from taking any action designed to enforce said Condition No. 4, or otherwise to terminate plaintiff's ownership of stock in the Federal Reserve Bank of San Francisco, or plaintiff's membership in the Federal Reserve System by any action predicated on said Condition No. 4.

5. Such other, further and different relief as the Court may deem equitable and meet in the premises.
December 24, 1945.

FULTON, WALTER & HALLEY.

By EUGENE O'DUNNE, JR.

A Partner

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Filed Jan 31 1946

Motion to Dismiss

Come now the defendants by their attorneys undersigned, and move this Honorable Court to dismiss the complaint herein upon the following ground:

This Court is without jurisdiction of the subject matter of the complaint because it presents no justiciable controversy between the parties hereto.

EDWARD M. CURRAN,
United States Attorney for the
District of Columbia,
Court House,
Washington, D. C.

GEORGE B. VEST
J. LEONARD TOWNSEND
Board of Governors of the
Federal Reserve System,
Washington, D. C.
Counsel for Defendants.

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Filed Jan 31 1946

Affidavit of Bray Hammond

WASHINGTON,

District of Columbia, ss:

Bray Hammond, being first duly sworn, does on oath depose and say as follows:

That he is the Assistant Secretary of the Board of Governors of the Federal Reserve System and is authorized by it to make this affidavit:

That the following excerpt is a true copy of a portion of the minutes of a meeting of the Board of Governors of the Federal Reserve System held in Washington on Monday, January 28, 1946, at 4:45 p. m., at which there were present the following members of the Board: Mr. Eccles,

Chairman, Mr. Ransom, Vice Chairman, and Messrs. Szymczak, McKee, Draper, and Evans:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation."

Given under my hand and the seal of the Board of Governors of the Federal Reserve System this 31st day of January, A. D. 1946.

BRAY HAMMOND
Assistant Secretary.

Subscribed and sworn to before me this 31st day of January, A. D. 1946.

ROYAL A. POUND
Notary Public.

My Commission expires Nov. 30, 1950.

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Filed Mar 14 1946

Opinion

Motion by defendants to dismiss complaint in action for a declaratory judgment.

J. Leonard Townsend, Esq., Hon. Edward M. Curran, United States Attorney for the District of Columbia, and George B. Vest, Esq., of Washington, D. C., for the Motion.

Samuel B. Stewart, Esq., of New York, N. Y.; Blake, Voorhees and Stewart of New York, N. Y.; Fulton, Walter & Hahey, of Washington, D. C.; and Sanner, Fleming & Irwin, of Los Angeles, California, opposed.

This is an action for a declaratory judgment. The plaintiff is the Peoples Bank, a banking corporation organized under the laws of the State of California. The defendants are members of the Board of Governors of the Federal Reserve System. The purpose of the action is to secure an adjudication that one of the conditions attached to the plaintiff's admission to membership in the Federal Reserve System is invalid, null and void. The defendants move to dismiss the complaint on the ground that

14 no justiciable controversy is presented and that, therefore, the action does not lie.

It appears from the complaint that the Peoples Bank was admitted to membership in the Federal Reserve System on May 6, 1942, subject to the following condition:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

In other words, if the Transamerica Corporation, or any of its affiliates or subsidiaries, were to acquire any interest in the Peoples Bank, the latter is to withdraw from membership in the Federal Reserve System on notice from the Board of Governors.

The complaint further alleges that subsequently to the admission of the Bank to membership in the Federal Reserve System, the Transamerica Corporation, without the plaintiff's assistance or prior knowledge, purchased 540

shares of the plaintiff's capital stock, and now owns the stock so acquired. The Bank informed the defendants of these transactions and demanded a cancellation of the above-mentioned condition. This demand has not been complied with. It is further alleged in substance that in the light of the circumstances, the existence of the condition is a hindrance to the plaintiff's business, as the plaintiff is subject to the constant and continuing threat or possibility of an incalculable loss, which would accrue

15 if the bank were deprived of its membership in the Federal Reserve System. It is not denied that the Board of Governors of the Federal Reserve System is empowered to prescribe conditions on which banks may join the System (U. S. Code, Title 12, Sec. 321). It is contended, however, that the imposition of the condition here involved was beyond the authority of the Board. The bank seeks an adjudication that the condition is invalid.

The question presented on this motion to dismiss the complaint is whether a justiciable controversy is involved, which may form the basis for a declaratory judgment. In order to reach a determination of this issue, it is first necessary to consider the basic principles governing actions for declaratory judgments.

Actions for declaratory judgments represent a comparatively recent development in American jurisprudence. The traditional and conventional concept of the judicial process has been that the courts may act only in case a litigant is entitled to a coercive remedy, such as a judgment for damages or an injunction. Until a controversy had matured to a point at which such relief was appropriate and the person entitled thereto sought to invoke it, the courts were powerless to act. At times, however, there may be an actual dispute as to the rights and obligations of the parties, and yet the controversy may not have ripened to a point at which an affirmative remedy is needed. Or, this stage may have been reached and yet the party entitled to seek the remedy may fail or decline to take steps to enforce it. For

example, the maker or indorser of a promissory note may have stated to the payee that the instrument would not be honored at maturity, because, perhaps, his signature
 16 is claimed to have been forged or procured by fraud or affixed without his authority. The payee had to wait until payment was due before appealing to the courts. It might have been important for him to ascertain in advance whether the note was a binding obligation and whether he might rely on it and list it among his assets. Nevertheless, he could receive no judicial relief until the instrument became due and was dishonored. Or it might have been necessary for a person to determine whether he was bound by some contractual provision which he deemed void. In that event, if he desired to contest the matter, he had to assume the risk and to hazard the consequences of committing a breach and then await a suit. Or, the owner of a patent might assert that a manufacturer was infringing his monopoly, while the latter contended that his product was not an infringement or that the patent was invalid. The manufacturer was helpless, however, to secure an adjudication of the issue, but had to pursue his course of action and await suit for infringement, unless he preferred to yield and discontinue his activity.

The purpose of actions for declaratory judgments is to provide a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to it fails to invoke it. The privilege of bringing such actions places a new weapon or implement at the disposal of the courts. It does not expand their jurisdiction. It introduces merely a new and more flexible procedure for determining controversies and adjudicating rights and obligations. It enlarges the judicial process and renders it more pliant and malleable.

17 As judicial tribunals exist for the purpose of deciding actual controversies, it is not within the pur-

view of this highly desirable and wholesome innovation that the courts shall render advisory opinions or answer abstract questions to satisfy the convenience or the curiosity of the inquirer. If the action is brought in a Federal court, this limitation and qualification is emphasized by the constitutional provision restricting the jurisdiction of the Federal judiciary to the decision of "cases and controversies". Actual controversies frequently arise, however, under circumstances requiring solely a declaration of rights without an award of coercive relief. In such a situation, an action for a declaratory judgment may be maintained.

The declaratory judgment procedure has been known in England for a great many years. In 1922, after its adoption by a number of States, the National Conference of Commissioners on Uniform State Laws drafted and recommended a uniform Declaratory Judgment Act, which has been enacted by a great many of the States.¹ The Federal Declaratory Judgment Act became law in 1934.² The report of the Senate Committee on the Judiciary, which recommended the passage of the legislation (S. Rept. No. 18 1005, 73d Cong., 2d Sess.) contains the following illuminating statements:

"The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. . . . So now it is often

¹ For leading State cases on this subject, see *Sheldon v. Powell*, 99 Fla. 782; and *Kariher's Petition*, 284 Pa. 455.

² U. S. Code, Title 28, Section 400:

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

necessary to break a contract or a lease, or act upon one's own interpretation of his rights when disputed, in order to present to the court a justiciable controversy." In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights: . . . Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties."

The statute should be liberally construed, in accordance with the general canon of statutory construction applicable to remedial statutes. *Reliance Life Ins. Co. v. Burgess*, 112 F. (2d) 234 (C. C. A. 8th); *Mississippi Power and Light Co. v. City of Jackson*, 116 F. (2d) 924 (C. C. A. 5th); *Oil Workers' Inter-Union v. Texoma Nat. Gas Co.*, 146 F. (2d) 62 (C. C. A. 5th).

One of the leading cases interpreting and applying the Federal statute is *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, in which an insurance company was permitted to maintain an action for a declaratory judgment to secure an adjudication that a life insurance policy had lapsed for non-payment of premiums and had not matured by an alleged total and permanent disability of the insured. The court held that this dispute presented a justiciable controversy cognizable by the courts under the Declaratory Judgment Act. Mr. Chief Justice Hughes made the following observations on this subject (pp. 239-241):

"The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the

federal courts which the Congress is authorized to establish . . . Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . The controversy must be definite, and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. . . . And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312

U. S. 270, the court sustained the right of an insurance company to secure a declaratory judgment to the effect that under the circumstances presented it was not liable to indemnify the defendant, who was the insured named in a liability insurance policy issued by the

company. Mr. Justice Murphy made the following comments on this point (p. 273):

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-242. It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case. *Nashville, C. & St. L. Ry. Co. v. Wallace*, supra, p. 261.³

"That the complaint in the instant case presents such a controversy is plain."

It has been frequently held that actions for declaratory judgments may be maintained by insurance carriers to determine the extent of the coverage of insurance policies issued by them, or their liability under a specific set of facts. *Hepburn v. Pennsylvania Indemnity Corp.*, 71 App. D. C. 257; *Pennsylvania Casualty Co. v. Upchurch*, 139 F. (2d) 892 (C. C. A. 5th); *Employers Liability Assur. Corp. v. Ryan*, 109 F. (2d) 690 (C. C. A. 6th).

In *Altrater v. Freeman*, 319 U. S. 359, an action was brought to adjudicate that certain patents were invalid, or in the alternative, that they were covered by a certain license agreement. The Court held that the action might be maintained. It remarked that unless the plaintiff
21 could obtain an adjudication of his rights, he incurred the risk of judgments for damages in infringement suits and added that "It was the function of the

³ 288 U. S. 249.

Declaratory Judgments Act to afford relief against such peril and insecurity". (p. 365).

In *Dewey & Almy Chemical Co. v. American Anode*, 137 F. (2d) 68 (C. C. A. 3d), it was held that an action for declaratory judgment would lie to determine the validity of a patent. The same conclusion was reached in *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. (2d) 852, 854 (C. C. A. 7th), in which Judge Lindley stated:

"It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued."

In *Davis v. American Foundry Equipment Co.*, 94 F. (2d) 441 (C. C. A. 7th), such an action was upheld for the purpose of adjudicating the validity of a contract.

In *Perkins v. Elg.*, 307 U. S. 325, affirming 99 F. (2d) 408 (U. S. App. D. C.), an action for a declaratory judgment against the Secretary of Labor was held maintainable for the purpose of determining the plaintiff's citizenship.⁴

In *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, the Supreme Court upheld an action for a declaratory judgment for the purpose of determining whether in computing the number of working hours in coal mines under the Fair Labor Standards Act, it was proper to include time consumed by employees in traveling to the place
22 of work from the entrance to the mines.

In *Samuel Goldwyn Inc. v. United Artists Corp.*, 113 F. (2d) 703 (C. C. A. 3d), it was held that an action would lie to secure a declaratory judgment that certain contracts had been terminated.

In *Mississippi Power and Light Co. v. City of Jackson*, 116 F. (2d) 924, 925 (C. C. A. 5th), an action was brought to secure a determination as to the validity and construc-

⁴ This case originated in this jurisdiction. Mr. Chief Justice Groner in his opinion in the United States Court of Appeals (pp. 413-414) discusses this aspect of the litigation in considerable detail.

tion of certain contract provisions. In his opinion Judge Hutchieson made the following observations:

"While the declaratory judgment act has not added to the jurisdiction of the Federal courts, it has added a greatly valuable procedure of a highly remedial nature. Extending by its terms to all cases of actual controversy 'except with respect to Federal taxes', it should be, it has been given a liberal construction and application to give it full effect . . . a normal, indeed a common use of it has been in the construction of contracts and the declaration of rights under them."

The latest case on this point in this jurisdiction is *Farrall v. District of Columbia Amateur Athletic Union*, decided February 25, 1946, in which the United States Court of Appeals upheld the rights of a member of the District of Columbia Amateur Athletic Union to secure an adjudication as to his right to obtain a sanction to engage in an exhibition.

Accepting the foregoing principles and authorities as a guide, it is clear that a justiciable controversy exists in the instant case, warranting recourse to an action for a declaratory judgment. One of the conditions on which the plaintiff was admitted to membership in the Federal Reserve System, was that on demand of the Board of Governors the plaintiff would withdraw from the System if any of its shares of stock were acquired by the

23 Transamerica Corporation, or any of its subsidiaries or affiliates. Supervening events have created a situation enabling the defendants to invoke this condition. The plaintiff claims that the condition is ultra vires and illegal, and has made a demand on the Board of Governors for its cancellation. The Board maintains the validity of the condition. In fact, counsel for the defendants, with commendable candor and disarming emphasis, so admitted in open court on the argument of this motion. In view of events that have transpired, the condition hangs

over the bank like the sword of Damocles ready to strike whenever the Board of Governors chooses to wield the weapon at its command. In the words of Mr. Justice Douglas in *Altwater v. Freeman*, 319 U. S. 359, 365, "It was the function of the Declaratory Judgments Act to afford relief against such peril and insecurity".

The plaintiff is not seeking an answer to a hypothetical question, or a solution of a theoretical or abstract problem. In making its future plans and in protecting its business, it is essential from the standpoint of the plaintiff that the validity of the condition be adjudicated. Failure to enforce the condition thus far, would hardly estop or preclude the defendants or their successors from doing so at some future time. To say that no actual controversy exists between the parties is not realistic.

No reason is perceived why the defendants should oppose a decision on this issue at this time. If the matter were not subject to any judicial review under any circumstances, their attitude would be understandable. If, however, the defendants should at any time seek to enforce the condition, a judicial adjudication as to its validity could be secured by the plaintiff in an action for an injunction. It seems desirable as a matter of orderly administration and substantial justice that such a determination be had at an early stage of the controversy. It does not seem to the court that a governmental or quasi-governmental agency should interpose obstacles or place obstructions in the way of an early judicial determination of the validity of its potential actions, if their legality is challenged by a party subject to them. No prejudice to the defendants is discernible from such an adjudication.

The authorities on which the defendants rely do not dispose of the question. They may be divided into three groups. First, some of the cases involve statutes to which criminal sanctions are attached. Obviously, it is inappropriate to render a declaratory judgment for the purpose of determining whether a specific activity would constitute

a crime. Such matters are left to determination by criminal prosecutions. Another group comprises cases involving attempts to secure determinations as to the validity of prospective actions of administrative bodies acting in a quasi-judicial capacity. To do so, however, would partially at least deprive the administrative body of its jurisdiction, and would contravene the principle that if a specific mode of reviewing the action of such an agency is provided by statute, the prescribed remedy is exclusive. The third category comprehends cases in which the defendant had no final authority over the matter in dispute. Manifestly, in such instances, a declaratory judgment would deal with a moot case. None of the authorities cited by the defendants supports their contention that no justiciable controversy is presented in the instant case.

25 The defendants also call attention to *Peoples Bank v. Federal Reserve Bank of San Francisco*, 58 F. Supp. 25, decided by the District Court of the United States for the Northern District of California, in which an action was brought by the present plaintiff against the Federal Reserve Bank of San Francisco, the Federal Reserve Agent, and the Board of Governors of the Federal Reserve System, to annul and enjoin the enforcement of the condition involved in this action. The action was dismissed as against the Board of Governors on the ground that the Board was not an inhabitant of the Northern District of California, and, therefore, might not be sued therein without its consent. It was dismissed as against the Federal Reserve Bank of San Francisco and against the Federal Reserve Agent on the ground that they had no authority to act and that there was no justiciable controversy as to them, inasmuch as the administrative power to expel banks from the Federal Reserve System is vested by law solely in the Board of Governors. The opinion did not pass either on the validity of the condition, or on the propriety of maintaining an action for a declaratory judgment against the Board of Governors of the Federal Reserve

System in the jurisdiction in which they are subject to suit. Consequently, the case does not bear upon the issues presented in this action.

I conclude that the complaint presents a justiciable controversy which may be appropriately adjudicated in an action for a declaratory judgment.

Motion to dismiss the complaint is denied.

ALEXANDER HOLTZOFF
Associate Justice.

March 14, 1946.

26

Filed Mar 18 1946

Order

This cause came on for hearing of defendants' motion to dismiss the complaint because it presents no justiciable controversy between the parties thereto, and the Court having heard the arguments of counsel and being advised, it is by the Court this 18th day of March 1946

Ordered that defendants' motion be and the same hereby is in all respects denied.

By the Court

ALEXANDER HOLTZOFF
Alexander Holtzoff, *Justice*

27

Filed Mar 25 1946

Joint and Several Answer of Defendants

Now come Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, the defendants herein, by their attorneys undersigned, and for answer to the complaint these defendants and each of them severally say as follows:

First Defense

On the basis of the facts appearing in the complaint, plaintiff is estopped from challenging the validity of Condition No. 4.

Second Defense

The complaint fails to state any claim against the defendants herein, or any of them, upon which any relief can be granted, because:

1. The complaint shows on its face that, in imposing Condition No. 4, the Board of Governors of the Federal Reserve System was acting in the exercise of an administrative discretion conferred upon it by section 9 of the Federal Reserve Act (12 U. S. C. 321); the court is therefore without authority to substitute its judgment for that of the Board in a matter which is within the discretionary authority of such Board;
- 28 2. The complaint shows on its face that Condition No. 4 is valid; and
3. For other reasons apparent of record.

EDWARD M. CURRAN

*United States Attorney for the
District of Columbia,*

Court House,
Washington, D. C.

GEORGE B. VEST

J. LEONARD TOWNSEND

*Board of Governors of the
Federal Reserve System,
Washington, D. C.*

Counsel for Defendants.

Filed Mar 25 1946

Motion for Judgment on the Pleadings

Now come Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, defendants herein, by their attorneys undersigned, and move this Honorable Court to enter judgment upon the pleadings herein, and for cause therefor said defendant say as follows:

1. On the basis of the facts appearing in the complaint plaintiff is estopped from challenging the validity of Condition No. 4.

2. The complaint fails to state any claim against the defendants herein, or any of them, upon which any relief can be granted.

EDWARD M. CURRAN

*United States Attorney for the
District of Columbia,
Court House,
Washington, D. C.*

GEORGE B VEST

J LEONARD TOWNSEND

*Board of Governors of the
Federal Reserve System,
Washington, D. C.
Counsel for Defendants.*

Filed Apr 15 1946

**Motion for Summary Judgment Pursuant to Rule 56 and
for Speedy Hearing of an Action for a Declaratory
Judgment Pursuant to Rule 57**

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint, on the

ground that the affirmative defenses set forth in defendants' answer are insufficient as a matter of law and that there is therefore no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence

31 before it and by interrogating counsel; ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just, and that the Court in such event order a speedy hearing of the action, which is one for a declaratory judgment, and advance it on the calendar pursuant to Rule 57 of the Federal Rules of Civil Practice.

3. This motion is based upon:

(a) The complaint filed in this Court on December 24, 1945.

(b) The defendants' motion to dismiss upon the ground that this Court is without jurisdiction of the subject matter of the complaint because it presents no justiciable controversy between the parties hereto, filed in this Court on January 31, 1946.

(c) The order of this Court made and entered by Hon. Alexander Holtzoff on March 18, 1946, in all respects denying said motion to dismiss.

(d) The opinion of Hon. Alexander Holtzoff dated and filed herein on or about March 14, 1946, upon said motion to dismiss.

(e) The joint and several answer of the defendants served and filed herein on March 25, 1946.

(f) The affidavit of W. M. Parker sworn to April 4, 1946, and exhibits numbered 1 to 12, inclusive, annexed thereto and incorporated by reference therein.

(g) The affidavit of John S. Griffith sworn to April 4, 1946.

32 (h) The affidavit of W. L. Andrews sworn to April 6, 1946, and exhibits numbered 14 to 28, inclusive, annexed thereto and incorporated by reference therein.

(i) Affidavit of A. L. Elliott Ponsford sworn to April 6, 1946.

(j) The affidavit of Laban H. Brewer sworn to April 4, 1946.

(k) The affidavit of Michael G. Luddy sworn to February 2, 1946.

Dated, April 15, 1946.

BLAKE, VOORHEES & STEWART

By SAMUEL B. STEWART, JR.
20 Exchange Place
New York 5, N. Y.

FULTON, WALTER & HALLEY

By JOSEPH W. BURNS
Occidental Hotel Building
1421 Pennsylvania Avenue
Washington, D. C.

SANNER, FLEMING & IRWIN

By JOHN A FLEMING
5658 Wilshire Boulevard
Los Angeles, California
Counsel for Plaintiff

Filed Apr 15 1946

Affidavit of W. M. Parker

STATE OF CALIFORNIA

County of Los Angeles, ss.:

W. M. Parker being duly sworn, deposes and says:

I am Secretary of the plaintiff, Peoples Bank, and have been such since the organization of said Bank. This affidavit is submitted in support of the plaintiff's motion for summary judgment for the purpose of setting forth for the information of the Court the exact circumstances, as disclosed by the records of the plaintiff Bank, in which Condition No. 4 prescribed by the defendants was imposed upon the plaintiff.

The organization of Peoples Bank in Lakewood Village, which is a suburb of Los Angeles, California, was begun in the Fall of the year 1941. The organizers of the Bank knew that in order for the Bank to function as such it would be necessary for it to have Federal Deposit Insurance. There were two ways prescribed by law for a State bank to obtain Federal Deposit Insurance: (1) By direct application to the Federal Deposit Insurance Corporation; and (2) By an application for membership in the Federal Reserve System which, under the law, automatically carried with it Federal Deposit Insurance.

34 The organizers of the Peoples Bank deemed it desirable to have membership in the Federal Reserve System and therefore chose that method of obtaining Federal Deposit Insurance. Accordingly, on Oct. 15, 1941, Mr. Clyde Doyle of Long Beach, California, who was counsel for the organizers of the Bank, addressed a letter to the Federal Reserve Bank of San Francisco, enclosing a signed copy of a letter dated September 24, 1941 by George J. Knox, Superintendent of Banks of the State of California, in which permission was granted to proceed with the organization of Peoples Bank, such permission being based

on the condition that Federal Deposit Insurance be obtained. Mr. Doyle's letter requested information as to the procedure for obtaining membership in the Federal Reserve System. A copy of Mr. Doyle's letter is annexed hereto, marked Exhibit No. 1, and incorporated herein. A copy of the letter of the California Superintendent of Banks, which was enclosed with Mr. Doyle's letter, is annexed hereto, marked Exhibit No. 2, and incorporated herein. The attention of the court is respectfully directed to the sentence of the said letter from the California Superintendent of Banks which imposed a condition upon the Peoples Bank that it would have to obtain Federal Deposit Insurance, to be effective concurrently with its opening for business.

In reply Mr. Doyle received a letter signed by Mr. R. B. West, Vice President of the Federal Reserve Bank of San Francisco, dated October 21, 1941, a copy of which is annexed hereto, marked Exhibit No. 3, and incorporated herein.

Under date of December 2, 1941, Mr. Doyle wrote to the Federal Reserve Bank of San Francisco enclosing in duplicate the application of Peoples Bank for membership in the Federal Reserve System. A copy of said letter, marked Exhibit No. 4, is annexed hereto and incorporated herein. A copy of the application for membership, dated November 28, 1941, filed by the plaintiff is annexed hereto, marked Exhibit No. 5 and incorporated herein. It will be noted that said application bore the certificate in usual form of

Albert C. Agnew, as counsel for the Federal Reserve Bank of San Francisco, certifying that in his opinion the Peoples Bank was legally qualified for membership and that the application was "in due and proper form". The technical deficiencies mentioned in the letter of Mr. West, dated December 5, 1941, were promptly supplied.

Subsequently, as appears from an affidavit of William A. Day, then President of the Federal Reserve Bank of

San Francisco, sworn to May 31, 1944, and filed in the District Court of the United States for the Northern District of California, Southern Division, Mr. Day received a letter dated February 14, 1942, signed by Chester Morrill, Secretary of the Board of Governors of the Federal Reserve System, stating that the Board "is unwilling to approve the application on the basis of the information now before it" and asking Mr. Day to inform the applicant accordingly but not stating any reason for such action. A copy of Mr. Morrill's letter to Mr. Day, dated February 14, 1942, is annexed hereto, marked Exhibit No. 6, and incorporated herein.

The plaintiff Bank was officially notified of the action of the Board of Governors in disapproving its application by letter of Mr. R. B. West, Vice President of the Federal Reserve Bank of San Francisco, dated February 20, 1942, a copy of which is annexed hereto, marked Exhibit No. 7, and incorporated herein.

Thereafter, under date of February 20, 1942, a request for reconsideration was made to the Board of Governors by the plaintiff Bank over the signature of E. B. Martin, Vice President. A copy of Mr. Martin's letter dated February 20, 1942, is annexed hereto, marked Exhibit No. 8, and incorporated herein.

It appears from the aforementioned affidavit of Mr. Day that such request for reconsideration was forwarded by the Federal Reserve Bank of San Francisco to the Board of Governors of the Federal Reserve System with a letter of Mr. R. B. West, Vice President of the Federal Reserve Bank of San Francisco, dated February 21, 1942. A copy of such letter is annexed hereto, marked Exhibit No. 9, and incorporated herein.

36 Under date of March 11, 1942, Mr. West wrote to Mr. Martin stating the basis upon which he had been requested to inform the plaintiff Bank that the Board of Governors would be willing to reconsider its application.

A copy of Mr. West's letter dated March 11, 1942, is annexed hereto, marked Exhibit No. 10, and incorporated herein.

Under date of April 23, 1942, the plaintiff Bank replied to Mr. West's letter of March 11, 1942, enclosing the information requested by said letter of March 11, 1942. A copy of said letter of April 23, 1942, together with copies of the enclosures, is annexed hereto, marked Exhibit No. 11, and incorporated herein.

The plaintiff Bank was then notified of the approval of its application and the imposition of Condition No. 4 in addition to the usual conditions in such a situation, which were numbered 1, 2 and 3, respectively, by letter of the Board of Governors of the Federal Reserve System, signed by L. B. Bethea, Assistant Secretary, dated May 6, 1942. A copy of said letter of May 6, 1942, is annexed hereto, marked Exhibit No. 12, and incorporated herein.

The attention of the Court is particularly directed to the statement of the reason for the imposition of Condition No. 4 as set forth in said letter and repeated here for the convenience of the Court:

"The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status."

The plaintiff Bank was never informed by the defendants nor by anyone else prior to March 24, 1944 that it had been agreed between the defendants and the Federal Deposit Insurance Corporation that in the event the plaintiff should be forced to withdraw from membership in the Federal Reserve System pursuant to Condition No. 4 it would be auto-

matically refused Federal Deposit Insurance upon a direct application therefor to the Federal Deposit Insurance Corporation.

37. It was not until February 17, 1944, when Transamerica Corporation presented certificates for 500 shares of the plaintiff Bank's stock for transfer into its name, that the plaintiff Bank had any knowledge of the acquisition by Transamerica Corporation of any of such stock.

At a meeting of the Board of Directors of Peoples Bank thereafter held on March 24, 1944, plaintiff's Directors were informed for the first time of the existence of the agreement between the defendants and the Federal Deposit Insurance Corporation that the enforcement of Condition No. 4 would result in the deprivation of plaintiff's Federal Deposit Insurance. At that meeting the Board of Directors of the plaintiff Bank adopted the following resolution:

"Be It Resolved, that Peoples Bank of Lakewood Village does hereby authorize such legal proceedings to be instituted on its behalf as will be calculated to determine the legal effect of the said condition, and that to this end the bank does hereby authorize its President to employ counsel to represent the bank in the premises."

The plaintiff Bank thereafter promptly notified the Board of Governors of such acquisition and commenced legal proceedings to obtain a declaratory judgment affirming its continued right to exist and function as a bank with membership in the Federal Reserve System and with Federal Deposit Insurance upon the same basis as is permitted by law to other State banks.

Plaintiff's original suit to accomplish that purpose was brought in the United States District Court for the Northern District of California, Southern Division, and was dismissed upon jurisdictional grounds. This action was thereafter commenced in this Court.

W. M. PARKER

Subscribed and sworn to before me this 4th day of April,
1946.

PAUL MILLETTE O'NEILL
*Notary Public in and for the
County of Los Angeles, State
of California.*

My Commission Expires Dec. 25, 1949.

38

Filed Apr 15 1946

Exhibit No. 1

October 15, 1941

Clyde Doyle
Our File No. 658

Mr. H. A. Sonne
Chief Examiner

Federal Reserve Bank of San Francisco
Sansome and Sacramento Streets
San Francisco, California

Re: Peoples Bank, Lakewood Village
Los Angeles County, California
Application

Dear Sir:

I herewith hand you copy of letter from the State Banking Department of California, dated at San Francisco on September 24, 1941. This is a carbon copy of an original letter, as per this carbon. This carbon was mailed me by the State Banking Department of California from the San Francisco office, accompanying the original communication, and I hand it to you with the following communication and request on behalf of my clients concerned.

Application is hereby respectfully made for membership in the Federal Reserve System of the United States of America.

Mr. E. B. Martin, whose address is 117 Ocean Avenue, Seal Beach, Orange County, California, will make him-

self immediately available to your requirements. His phone number is 837-50, Long Beach. Also, the undersigned, Clyde Doyle, will do likewise.

It is the desire of the group to move forward as expeditiously as possible in this connection. Your forwarding of the necessary application by return mail, and informing us of the information required to be supplied, will be appreciated, for which I thank you in advance.

Very truly yours

CLYDE DOYLE

CD/NBM

CC to Geo. J. Knox, San Francisco

CC to John McFaul, Los Angeles

Enc. 1

39

Filed Apr. 15 1946

Exhibit No. 2

**STATE BANKING DEPARTMENT
OF CALIFORNIA**

San Francisco, September 24, 1941.

Clyde Doyle and John Gee Clark,
Attorneys at Law,
612 Jergins Trust Building,
Long Beach, California

Gentlemen:

This is in reference to the application filed by you on behalf of E. B. Martin and others, for the organization of a bank at Lakewood Village, Los Angeles County, California.

During the interim between the date you first discussed this matter and since the filing of your application, I have been giving the matter serious consideration. An investigation was made of the territory to determine whether or not the public convenience and advantage will be promoted.

by the establishment of a new bank at Lakewood Village. Since the investigation I have made a personal survey of the territory to be served by the proposed bank, and I am satisfied that the public convenience and advantage will be promoted by the establishment of a new bank in this location. Therefore, I am granting my permission to proceed with the proposed organization and this enables you to circulate your stock subscription lists in order to raise the necessary capital. In other words, my findings are that the public convenience and advantage will be promoted by the establishment of a bank, and you have my permission to organize a commercial and savings bank. This action is taken by me in accordance with the provisions of Section 127 of the Bank Act.

For your convenience in circulating your stock subscription list, I am sending under separate cover 25 forms which contain an affidavit of stock ownership. Please have your subscriptions taken upon these blanks and the affidavit of ownership made by each subscriber, and upon completion of the list of stockholders you will present these forms and affidavits to this office. No commissions will be allowed on the sale of stock in the proposed institution and you will be limited to an expense of not more than \$500.00 for the purpose of organization.

40 When you have determined your complete list of stockholders, we shall appreciate a financial statement of the principal holders of stock and you will also submit a list of the directors and officers whom you propose to conduct the affairs of this institution, together with a brief history of the background of each of them.

The name of the proposed corporation referred to in your application, is Peoples Bank. This name is approved by me.

This commitment to permit you to organize a bank of course, is based on the condition that you will have obtained Federal Deposit Insurance which shall be effective con-

currently with your opening for business. In other words, no license to actually transact business will be issued until I am satisfied that you have obtained this insurance either through membership in the corporation or the Federal Reserve Bank. You are now in a position, if it is your intention to join the Federal Deposit Insurance Corporation, to file a notice of intention, but if you intend to obtain insurance through membership in the Federal Reserve System, you must wait until you file your articles of incorporation and then make your application.

It is noted from your original application that you proposed to capitalize by selling \$300,000 par value of common stock and that you would have a surplus of \$75,000. In a letter dated September 20th, forwarded after a discussion with you and Mr. Martin, we note that it is your desire not to commence business with a paid-up capital of \$100,000 and a surplus of \$25,000. There is no objection on my part to your commencing business at this capital structure and of course from time to time as the Bank Act requires it because of deposit liability or the nature of the business which you may assume commands it, you will increase the paid-up capital and surplus. Therefore, you are authorized to commence business in this territory with a paid up cash capital of \$100,000 and a paid up cash surplus of \$25,000. After you have incorporated and some time prior to the opening, your directors should pass a resolution apportioning this capital and surplus between departments subject to my approval. A certified copy of this resolution should be forwarded me and then my approval will issue as the apportionment of capital and surplus between departments.

Assuming that you are satisfied that the necessary capital can be raised and you can satisfy us as to the stock ownership, you should commence the preliminary work for drafting the articles of incorporation. These articles of course, will have to be submitted to this office and you should send an original and at least four copies. It might

be well to send a copy of the proposed set-up on or before the organizers adopt them and then we can determine if there are any changes necessary. When the articles are approved by us, they are then forwarded to the Secretary of State who retains the original, certifies and endorses his filing date on the copies and returns them to you for filing with your County Clerk. The County Clerk
 41 will endorse his filing date thereon, retain one copy and send the balance to you. One copy should then be forwarded here for our permanent records and upon notification by us that it has been filed here, your corporate existence commences.

Following the incorporation, it will be necessary to adopt the by-laws, which should first be submitted to this office for approval, and when finally passed, a certified copy is filed with us.

Subsequent to your incorporation the board can meet and pass the necessary resolution segregating the capital and surplus between departments and also pass such resolutions as are necessary in designating reserve and non-reserve depositaries. Immediately upon incorporation the directors should take an oath of office and then they should be filed in this department.

When you have completed all of the preliminaries and are in a position to furnish us with evidence that the deposits will be insured as of the date of opening, it will be necessary for you to determine the date upon which you wish to commence operations and upon being notified in sufficient time, I shall issue my license which will be your certificate of authority to engage in business. However, before the license is issued, you must also furnish us with a certificate of a bank showing that cash equivalent to your proposed capital and surplus is held on deposit for your institution.

It is my suggestion that you work closely with this office and we will give you every assistance in completing the de-

tails of organization so that you will suffer as little inconvenience as possible.

Forms for oath of directors, designation of depositaries, by-laws and articles of incorporation will be sent to you under separate cover.

A duplicate original of this letter is being forwarded you so that it may be filed with the federal authorities at the time you make your application for Federal Deposit Insurance.

Yours very truly,

GEORGE J. KNOX

Superintendent of Banks.

Enclosure

42

Filed Apr 15 1946

Exhibit No. 3

FEDERAL RESERVE BANK OF SAN FRANCISCO

October 21, 1941

Mr. Clyde Doyle,
Suite 612, Jergins Trust Building,
Long Beach, California.

Re: Your File No. 658

Dear Mr. Doyle:

This is to acknowledge receipt of your letter of October 15, 1941, enclosing a signed copy of letter dated September 24, 1941, addressed to yourself and John Gae Clark by Geo. J. Knox, Superintendent of Banks, in which permission is granted you to proceed with the organization of "People's Bank", Lakewood Village, Los Angeles County, California. It is noted that the permission to organize the bank is based on the condition that Federal Deposit insurance be obtained, to become effective concurrently with the

opening of the bank. As a medium to that end, you have chosen membership in the Federal Reserve System.

Section 9 of the Federal Reserve Act provides that—

“Any bank incorporated by special law of any State, or organized under the general laws of any State of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System”

It, therefore, appears necessary that the organization of the subject bank and its incorporation be completed before an application for membership in the Federal Reserve System is filed.

There are enclosed three sets of approved application forms for your use when incorporation of the institution has been accomplished. There is also enclosed a copy of Regulation H pertaining to membership of State banking institutions in the Federal Reserve System.

When the board of directors has authorized the officers of the bank to make application, the application, together with all exhibits, should be prepared in triplicate and the original and one copy filed with the Federal Reserve Bank of San Francisco—third copy should be retained for the bank's record. The bank being newly organized and not yet licensed to do business, obviously all exhibits called for in the application cannot be furnished. If the bank shows any assets, a certified statement of resources and liabilities (Exhibit I) should be attached, as should also
43 certified copies of its articles of incorporation, together with certified copy of the Superintendent of Bank's certificate of approval thereof. Other exhibits seem inapplicable.

As soon after receipt of the application as is practicable, we shall make the investigation which is usual in connection with requests for membership, after which the application will be forwarded to the Board of Governors of the

Federal Reserve System, Washington, D. C. for its consideration and action thereon.

Should there arise any questions regarding the preparation or filing of the application, please feel free to call upon us.

Yours very truly,

R. B. WEST

Vice President.

Enclosures

44

Filed Apr 15 1946

Exhibit No. 4

December 2, 1941

Federal Reserve Bank of San Francisco
San Francisco
California

Re: Peoples Bank (Lakewood Village,
Los Angeles County, California)
Our File No. 658

Attention Mr. R. B. West, Vice-President

Gentlemen:

I refer you to your favored communication of October 21, 1941, and would advise briefly that the Articles of Incorporation duly certified to by Geo. J. Knox, Superintendent of Banks, were filed with the Secretary of State November 27, 1941, and a duplicate copy thereof was filed with the County Clerk of Los Angeles County on December 1, 1941. By inadvertence, two duplicates of these Articles of Incorporation thus filed and endorsed were mailed to Mr. Geo. J. Knox, Superintendent of Banks, 343 Sansome Street, San Francisco, California, when, I think, the requirements of his office were only "one". I am asking Mr. Knox to call a messenger and have one of these duplicates thus mailed to him this day immediately sent to your office to complete your file on this requirement.

Am advised by Mr. E. B. Martin, the recently chosen Vice-President in charge of operations of this bank that the stationery is all printed, the location has been rented and is now being equipped, the capital has been raised and all parties interested are very, very anxious for the bank to open at the earliest possible date, in order to take advantage of, amongst other things, the transfer of savings funds and holiday deposits which are certain to be available.

Enclosed in duplicate original is Application for Membership in the Federal Reserve System made by Peoples Bank, Lakewood Village, Los Angeles County, California.

Trusting you will find these all in good order and thanking you in advance for the earliest possible consideration and approval of this application, I remain

Respectfully yours

CLYDE DOYLE

CD/NBM

CC to Geo. J. Knox

45

Filed Apr 15 1946

Exhibit No. 5

**APPLICATION FOR MEMBERSHIP
IN THE
FEDERAL RESERVE SYSTEM
MADE BY**

PEOPLES BANK

(Legal name of applying bank)

Lakewood Village
Los Angeles County
(City or town)

California
(State)

46 At a meeting of the Board of Directors, Peoples Bank, Lakewood Village, Los Angeles County, California, duly called and held on the 28th day of November, 1941, the following resolution was adopted:

"Whereas, it is the sense of this meeting that application should be made on behalf of this bank for membership in the Federal Reserve System in accordance with the provisions of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto; and

"Whereas, under the provisions of the Federal Reserve Act, such a bank applying for membership in the Federal Reserve System is required to subscribe for stock in a Federal Reserve bank in a sum equal to six per cent of the paid-up capital stock and surplus of such applying bank;

"Now, therefore, be it resolved, That the President or Vice President and the Cashier or Secretary of this bank be and they are hereby authorized, empowered, and directed to make application for and to subscribe to the appropriate number of shares, of a par value of \$100 each, of the capital stock of the Federal Reserve Bank of San Francisco, as determined on the basis of the capital stock and surplus of this bank as of the date upon which its membership in the Federal Reserve System becomes effective; to pay for such stock in accordance with the provisions of the Federal Reserve Act; to agree for and in behalf of this bank that, upon its admission to membership in the Federal Reserve System, it will comply with all the requirements of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant to law which are applicable to State banks and trust companies which become members of the Federal Reserve System; and to agree for and in behalf of this bank that reports and information regarding this bank may be interchanged between the Federal Reserve Bank of San Francisco and all State or Federal supervisory authorities having jurisdiction of this bank."

I hereby certify that the foregoing is a true and complete copy of a resolution duly adopted by the Board of Directors of this bank at a meeting thereof held on the date specified, at which a quorum was present, and that such resolution has not been amended or repealed and is still in full force and effect.

W. M. PARKER, *Secretary*
Peoples Bank
Lakewood Village
Los Angeles County,
California

Pursuant to the foregoing resolution, Peoples Bank, Lakewood Village, Los Angeles County, California, hereby makes application for the appropriate number of shares of the capital stock of the Federal Reserve Bank of San Francisco, of a par value of \$100 each, as determined on the basis of the capital stock and surplus of this bank as of the date upon which the membership of this bank in the Federal Reserve System becomes effective; agrees to pay for the same in accordance with the provisions of the Federal

Reserve Act; agrees that, upon its admission to
47 membership in the Federal Reserve System, it will comply with all the requirements of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant to law which are applicable to State banks and trust companies which become members of the Federal Reserve System; and agrees that reports and information regarding this bank may be interchanged between the Federal Reserve Bank of San Francisco and all State or Federal supervisory authorities having jurisdiction of this bank.

The following exhibits are attached to and made a part of this application:

Exhibit I. Two copies of a certified statement of condition of the bank as of November 28, 1941.

(The statement of condition is to be of a current date and, in so far as practicable, in the form appearing on the face of the latest form of report of condition submitted by State member banks to the Board (Form 105) and shall be supplemented by a statement of any contingent liabilities and any assets not shown by its books.)

* Exhibit II. Two copies of the report of the latest examination of the bank made by State banking authorities. (The applying bank may, if it desires, request the State Bank Supervisor to forward the copies direct to the Federal Reserve bank.)

Exhibit III. Two copies of all letters of criticism, if any, received from the State banking authorities in connection with the two latest reports of examination and two copies of replies thereto. (If no replies have been made, a statement should be submitted in duplicate showing what action has been taken by the bank with respect to the criticisms and requests of the State banking authorities.)

Exhibit IV. Two copies of the charter (certificate of authority to commence business) and articles of incorporation of this bank with all amendments to date certified by the appropriate State official. (If applicant has been involved in a consolidation whereby all rights, franchises, and interests of constituent institutions pass by operation of law to the consolidated bank, information should be furnished, in duplicate, as to any corporate powers acquired by the bank by virtue of such consolidation other than those shown in its charter or articles of incorporation.)

Exhibit V. Two copies of a statement of powers or functions that have been or are now being exercised or performed other than those usual to commercial banking. (Full details should be given, in duplicate, if applicant acts directly or indirectly in any fiduciary capacity, insures or guarantees real estate titles, underwrites fidelity bonds or acts as surety, conducts an insurance business, deals in, sells, or distributes stocks or securities to dealers or to the public, sells real estate mortgages, or participations therein,

with or without guarantee, conducts a real estate rental or brokerage business, or performs any other functions not necessarily incidental to commercial banking.)

Exhibit VI. (a) Two copies of a list of all branches, branch offices, agencies, or receiving stations showing with respect to each the location, date established, volume and nature of business transacted, and reference to the provisions of State law covering the establishment and operation of the branch.

(b) Two copies of any approval or authorization of the establishment of each branch or agency by State authorities required by State law.

Exhibit VII. Two copies of all agreements executed within the preceding five years, if any, with respect to waiver or restriction of deposits, subordination of deposits, or contributions involved in any rehabilitation or reorganization of the bank with a statement of the amounts involved at the time of each agreement and any subsequent modification of the agreements or repayments. If any agreements of the kinds described were executed prior to the preceding five years and as a result of which the bank is still obligated or subject to a claim of any kind, full information, in duplicate, regarding any such agreements should also accompany the application.

PEOPLES BANK,
Lakewood Village,
Los Angeles County,
California.

By E. B. MARTIN, *Vice-President.*

(Seal)

Attest:

W. M. PARKER, *Secretary.*

Note: If six per cent of the capital and surplus amounts to a sum not divisible by 100, the bank should apply for one additional share of stock for any excess or fractional part of \$100.

When determining the appropriate amount of the subscription for stock in the Federal Reserve bank, the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation should be included with the capital stock and surplus of the institution, but the amount of capital notes and debentures sold to others should not be included.

In the case of a bank which has set up a reserve for dividends payable in common stock, whether in connection with the retirement of preferred stock, capital notes, or debentures, or otherwise, such reserve shall be regarded as surplus for the purpose of determining the amount of Federal Reserve bank stock which the bank is required to hold, provided such reserve has been established pursuant to a resolution of the board of directors of the bank involved, will become a part of the permanent capital of the bank, and will not be used for any other purpose than the issuance of dividends, payable in common stock.

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Peoples Bank

Lakewood Village, California

Statement of Condition as of

November 28, 1941

ASSETS:

Due from Other Banks—Demand	\$125,000.00
Other Assets	None
Total Assets	\$125,000.00

LIABILITIES:

Capital Stock	\$100,000.00
Surplus	25,000.00
Other Liabilities	None
Total Liabilities	\$125,000.00

50 Board of Governors of the
Federal Reserve System

Form 83E—(1936)

(Should be signed by at least three directors, and the cashier or treasurer. If the signing directors and officer have any reservation as to any of the clauses in the certificate, an explanation similarly signed should be attached to this sheet.)

Certificate of Directors and Cashier

We, the undersigned directors and officer of the Peoples Bank, Lakewood Village, Los Angeles County, California, certify, to the best of our knowledge and belief, that Exhibit I, attached hereto, contains a true and complete statement of the condition of this bank on the date specified; that such statement includes all of the assets and liabilities of the bank; that the capital stock is unimpaired (this clause does not apply to mutual savings banks); and that the supplemental information submitted with and made a part of the application of this bank for membership in the Federal Reserve System is true to the best of our knowledge and belief.

E. B. MARTIN

WALTER EVERTS, JR.

O. H. ADY

W. M. PARKER, *Cashier*

Note: Type name under each signature.

Certificate of Counsel for Federal Reserve Bank

I, the undersigned, counsel for the Federal Reserve Bank of San Francisco, do hereby certify that, in my opinion, the Peoples Bank, Lakewood Village, Los Angeles County, California, is legally qualified, under its charter and the laws of the State of California, wherein it was incorporated, to purchase and hold stock in the Federal Reserve Bank of San Francisco, and to comply with the requirements of the

Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made in pursuance thereof, and that its attached application for membership in the Federal Reserve System is in due and proper form. Having made the necessary examination of such application and the accompanying papers which have a bearing on any legal matters involved and the State laws covering the organization and operation of this bank, I am satisfied as to the legal matters involved, except as otherwise noted.

ALBERT C. AGNEW

Counsel

Remarks:

Cash capital paid in \$100,000. Population of Lakewood Village (unincorporated) estimated by Examiner L. B. Armstrong after visit to location 3500-4000 (X-Letter 4397). License to transact business withheld by Superintendent of Banks until membership in Federal Reserve System is perfected.

ALBERT C. AGNEW

Note: Inappropriate parts of the counsel's certificate should be marked out when it has been determined whether the bank is authorized to purchase stock in the Federal Reserve Bank or, in the case of a mutual savings bank or similar institution, to make the required deposit in lieu of a purchase of stock.

Filed Apr 15 1946

Exhibit No. 6

Board of Governors of the Federal Reserve System
Washington

Address Official Correspondence to the Board

Seal

February 14, 1942

Mr. W. A. Day, President,
Federal Reserve Bank of San Francisco,
San Francisco, California.

Dear Mr. Day:

Reference is made to the application of the Peoples Bank of Lakewood Village, California, which has not yet been authorized to commence business, for membership in the Federal Reserve System. The Board has carefully considered the information accompanying this application, together with such other information as it has been able to develop with regard to the application, and has requested me to advise you that it is unwilling to approve the application on the basis of the information now before it. Please advise the applicant accordingly.

Very truly yours,

CHESTER MORRILL
Secretary

52

Filed Apr 15 1946

Exhibit No. 7

Federal Reserve Bank of San Francisco

February 20, 1942

Peoples Bank,
Lakewood Village,
Los Angeles County, California.

Dear Sirs:

Reference is made to your application for membership in the Federal Reserve System.

The Board of Governors of the Federal Reserve System has advised us that careful consideration has been given to the application, and we have been requested to inform you that the Board of Governors is unwilling to approve the application on the basis of the information now before it.

Yours very truly,

/s/ R. B. WEST

-Vice President.

53

Filed Apr 15 1946

Exhibit No. 8

February 20, 1942

Board of Governors of the
Federal Reserve System,
Washington, D. C.

Re: Membership Application
Peoples Bank,
Lakewood Village, California.

Dear Sirs:

We have just been informed of your action in rejecting our application for membership in the Federal Reserve System.

With the thought that a request for reconsideration might possibly be in order, we respectfully direct your attention

to the fact that major developments in defense industries adjacent to our proposed location have brought about a need for banking facilities that is far more urgent than when our application for membership was filed with you. There have been some changes made in our stock ownership, and in order that you may be informed of our current position, we wish to advise you that the 1000 shares of stock formerly held by the West Coast Securities Company have been sold to the following individuals who are prominent and well-known residents of Long Beach and immediate vicinity. These shares have been paid for from their own funds.

Clark J. Bonner	200 shares
Ralph B. Clock	200 shares
Chas. B. Hopper	200 shares
Harold R. Pauley	200 shares
Victor W. Hayes	200 shares

Messrs. Bonner, Clock and Hopper, original sponsors of this project, are no doubt dealt with in the report which is before you.

Harold R. Pauley, Vice President of the Petrol Corporation, Los Angeles, California, owns an additional 100 shares of our stock and has replaced his brother, Edwin W. Pauley, on our Board of Directors. Edwin W. Pauley finds it necessary to spend nearly all of his time in Washington. Mr. Harold R. Pauley has an estimated net worth of \$300,000.00.

Mr. Victor W. Hayes, 3519 E. Second Street, Long Beach, California, is a pioneer citizen of Long Beach, is retired from active business and receives a substantial income from oil and rentals.

54 For your information, we have attached a copy of a new list of our stockholders.

In the light of the above information, we respectfully request that you reconsider our application for membership.

Yours very truly,

PEOPLES BANK

E. B. MARTIN,

Vice President

55

Filed April 15 1946

Exhibit No. 9

Federal Reserve Bank of San Francisco

February 21, 1942

Air Mail

Board of Governors of the
Federal Reserve System,
Washington, D. C.

Dear Sirs:

As requested in the Board's letter of February 14, 1942, we have informed the Peoples Bank of Lakewood Village, California, that the Board is unwilling to approve its application for membership in the Federal Reserve System on the basis of the information now before it, and a copy of our letter to the bank is enclosed.

We have now received a letter, dated February 20, 1942, addressed to the Board of Governors by the Peoples Bank, Lakewood Village, requesting the Board's reconsideration of the bank's application, and submitting the additional information that 1,000 shares of its stock originally subscribed for by the West Coast Securities Company has been purchased by and issued to other individual stockholders in equal amounts of 200 shares each.

The above mentioned letter is enclosed without comment or recommendation, but with the request that the Board inform us by wire of its conclusions with respect to the bank's request for reconsideration of its application.

Yours very truly,

R. B. WEST
Vice President.

Enclosures

Filed Apr 15 1946

Exhibit No. 10

Federal Reserve Bank of San Francisco

March 11, 1942

Airmail

Mr. E. B. Martin,
Vice President, Peoples Bank
Lakewood Village,
Los Angeles County, California.

Dear Mr. Martin:

With further reference to your letter of February 20, addressed to the Board of Governors of the Federal Reserve System, requesting reconsideration of your application for membership in the Federal Reserve System, and our telephone conversation of today, we are requested to inform you that the Board of Governors will be glad to reconsider your application upon a definite showing by the directors of your bank—

1. That arrangements have been made by Mr. John S. Griffith, San Marino, California, for financing the purchase of his stock in a manner different from that in effect at the time of our investigation of your bank's application for membership, and that such arrangements are consistent with the other provisions of this letter.
2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.
3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such.

57 In furnishing the information requested, it will be appreciated if it will be prepared in duplicate, and, upon its receipt, the material will be forwarded to the Board of Governors for its approval.

Yours very truly,

R. B. WEST

Vice President.

58

Filed Apr 15 1946

Exhibit No. 11

Peoples Bank
Lakewood Village, California

April 23, 1942

Mr. R. B. West, Vice President
Federal Reserve Bank of San Francisco
San Francisco, California

Dear Mr. West:

Replying to your letter of March 11, 1942 we are inclosing all in duplicate:

1. Statement by John S. Griffith relative to the re-financing of the purchase of his stock to meet the first requirement in the Reserve Board's proposal.

2. Copy of Declaration made by all of our directors which deals with Section 2, 3 and 5 of the Reserve Board's proposal.

3. Statement by all of our stockholders to comply with Section 4 of the Reserve Board's proposal.

We wish to offer, as an explanation, the information that at the time Mr. Armstrong made his field examination, a proposal had been made to us by a representative of the Bank of America to loan us some used fixtures, counters, etc., to fit out a temporary location. At that time we were disposed to accept their offer, however, when these used and quite obsolete counters and fixtures were installed some time later, we received a bill dated January 7, 1942; their job No. 4766 from the Capital Company, totaling \$1,104.90 covering the purchase and installation of this equipment. We propose to pay this bill and, consequently, we do not feel that we are in any way obligated as a result of this transaction.

We shall appreciate your dispatching this information to the Reserve Board in Washington by air mail, requesting a reply by wire. The writer will communicate with you by telephone when this material has reached your desk to determine whether or not it will meet your requirements.

Yours respectfully,

E. B. MARTIN
Vice President

Incllosures

59

Long Beach, California
April 27, 1942

Federal Reserve Bank of San Francisco
San Francisco
California

Gentlemen:

In your letter of March 11, 1942 directed to Mr. E. B. Martin, Vice-President of Peoples Bank, you asked for a definite showing that arrangements have been made by Mr. John S. Griffith for financing the purchase of stock in Peoples Bank in a manner different from that in effect at the time of your investigation of the bank's application for membership.

Please be advised that the undersigned has effected a different arrangement for the financing of this stock and that said arrangements have not been made with Transamerica Corporation or any organization affiliated or closely identified with Transamerica Corporation or any other Bank Holding Company Group.

I have sold 500 shares of my stock to Mr. Norf James Jebbia, 2500 South Fremont Avenue, Alhambra, California and I have borrowed \$11,875.00 upon 475 shares of my stock from his father, P. D. Jebbia, also at 2500 South Fremont Avenue, Alhambra, California.

Yours very truly,

JOHN S. GRIFFITH

60

Peoples Bank
Lakewood Village, California

March 23, 1942

[Apparently this date
should be April 23.]

Federal Reserve Bank
San Francisco
California

Gentlemen:

We, the undersigned members of the Board of Directors of Peoples Bank, located at Lakewood Village, Los Angeles County, California, do hereby state as follows:

1. That the above mentioned bank is now organized as a bona fide local, independent institution, and is expected to be continued as such:

2. In view of the fact that the stockholders of the Peoples Bank have been asked to state in writing that they have no agreements or understandings, express or implied, with respect to the sale or transfer of the stock of the Peoples Bank to the Transamerica Corporation or any organization affiliated or closely identified with Transamerica Corporation or any other Bank Holding Company group, we assume that upon securing such signatures you will be

satisfied that the matters set forth in your letter of March 11th, 1942, have been complied with.

3. That the furniture equipping our banking quarters was purchased direct from Barker Bros., Los Angeles, California, and that we are not now and never have been obligated to Capital Company or any other part of the Transamerica group for the purchase of said furniture.

4. That the above mentioned bank is not now, and never has been obligated in any way, except by direct purchase agreement, to Capital Company or any other part of the Transamerica group for the installation of mechanical equipment, fixtures and safes in its banking quarters, and that said purchase agreement will be paid in full, as soon as permission to operate has been given by the State Superintendent of Banks.

61 In Witness Whereof, we have affixed our hands and seals this 23rd day of April 1942.

/s/ E. B. MARTIN

/s/ W. R. MARTIN

/s/ WALTER EVERTS, JR.

/s/ O. H. ADY

/s/ W. W. WERNER

/s/ RALPH H. CLOCK

/s/ CLARK J. BONNER

/s/ HAROLD R. PAULEY

/s/ CHAS. B. HOPPER

/s/ R. C. LEWIS

I, W. M. Parker, do hereby certify that I am the duly elected Secretary of Peoples Bank, located at Lakewood Village, Los Angeles County, California, and that the signers of the foregoing statements comprise the full membership of the Board of Directors of the above mentioned bank.

In Witness Whereof, I have attached my hand and the seal of this Corporation this 23rd day of April, 1942.

/s/ W. M. PARKER

Secretary

Seal

62

March 23, 1942

Federal Reserve Bank
of San Francisco,
San Francisco, California

Gentlemen:

I, the undersigned, being a stockholder of the Peoples Bank, Lakewood Village, California, do hereby state that I have no arrangements, expressed or implied, with respect to the sale or transfer of the stock of the Bank which I own to either the Transamerica Corporation, or any organization affiliated or closely identified with Transamerica Corporation, or any other Bank Holding Company group, and that I do not intend to enter into any such agreements or understandings.

Yours very truly,

.....

63

Filed Apr 15 1946

Exhibit No. 12

**BOARD OF GOVERNORS
of the
FEDERAL RESERVE SYSTEM**

May 6, 1942

Board of Directors,
Peoples Bank,
Lakewood Village, California.

Gentlemen:

The Board of Governors of the Federal Reserve System approves the application of the Peoples Bank, Lakewood Village, California, for stock in the Federal Reserve Bank of San Francisco, effective if and when the bank is duly authorized to commence business by the appropriate State authorities, subject to the numbered conditions hereinafter set forth:

1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

3. Such bank shall not engage as a business in issuing or selling either directly or indirectly, (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation.

4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System.

In connection with the foregoing conditions of membership, particular attention is called to the provisions of the Board's Regulation H regarding membership of State

banking institutions in the Federal Reserve System as amended effective November 20, 1939, with especial reference to section 6 thereof. A copy of the regulation is enclosed.

The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status.

If at any time a change in or amendment to the bank's charter is made, the bank should advise the Federal Reserve Bank, furnishing copies of any documents involved, in order that it may be determined whether such change affects in any way the bank's status as a member of the Federal Reserve System.

Acceptance of the conditions of membership contained in this letter should be evidenced by a resolution adopted by the Board of Directors and spread upon its minutes, and a certified copy of such resolution should be filed with the Federal Reserve Bank. Arrangements will thereupon be made to accept payment for an appropriate amount of Federal Reserve Bank stock, to accept the deposit of the required reserve balance and to issue the appropriate amount of Federal Reserve Bank stock to the bank.

The time within which admission to membership in the Federal Reserve System in the manner described may be accomplished is limited to 45 days from the date of this letter, unless the bank applies to the Board and obtains an extension of time. When the Board is advised that all of the requirements have been complied with and that the appropriate amount of Federal Reserve Bank stock has been issued to the bank, the Board will forward to the bank a

formal certificate of membership in the Federal Reserve System.

65 The Board of Governors sincerely hopes that you will find membership in the System beneficial and the relationships with your Reserve Bank pleasant. The officers of the Federal Reserve Bank will be glad to assist you in establishing your relationships with the Federal Reserve System and at any time to discuss with representatives of your bank means for making the services of the System most useful to you.

Very truly yours,

(Signed) L. P. BETHEA

Assistant Secretary

Enclosure

66

Filed Apr 15 1946

Affidavit of John S. Griffith

STATE OF CALIFORNIA

County of Riverside, ss.:

John S. Griffith being duly sworn, deposes and says:

I am a shareholder and Director of Peoples Bank, Lakewood Village, California, and have been such continuously since the organization of said bank; that as such Director and shareholder I was aware of the fact that said bank made application in the Fall of 1941 for membership in the Federal Reserve System and that said application was disapproved.

That during the latter part of February, 1942, as nearly as I now recollect, I was in Washington, D. C. and called at the offices of the Board of Governors of the Federal Reserve System in said city concerning said application; that I there met and talked to two members of said Board and the Secretary thereof; that as nearly as I now remember one of the said members was Honorable John McKee.

67 During the course of my conversation with the said Board members and Secretary I recall that statements were made to the effect that Secretary Morgenthau was opposed to increasing the number of banking offices of Bank of America and that it was stated that there was considerable agitation against increasing the banking interests of bank holding companies—so much so, that there was a prospect that legislation would be introduced to curb the expansion of bank holding companies. It was also stated in substance that upon assurances that the Peoples Bank was independent of Bank of America and Transamerica Corporation the Board might be disposed to reconsider the application.

JOHN S. GRIFFITH

Subscribed and sworn to before me this 4th day of April, 1946.

EDNA L. BROTT

*Notary Public in and for the
County of Riverside, State
of California*

(Seal)

My Commission Expires Feb. 7, 1948.

68

Filed Apr 15 1946

Affidavit of W. L. Andrews

STATE OF CALIFORNIA

City and County of San Francisco, ss.:

W. L. Andrews being duly sworn, deposes and says:

I am a Vice President and the Treasurer of Transamerica Corporation. This affidavit is submitted in support of the motion of the plaintiff, Peoples Bank, for summary judgment.

I am advised that the defendants' answer has not denied any allegation of the complaint and that such failure to deny has the same effect under Rule 8(d) of the Federal

Rules of Civil Procedure as an admission of every allegation, including the allegation of Paragraph IX that Condition No. 4 imposed by the defendants upon the plaintiff was and is arbitrary, capricious and discriminatory. However, because of my personal knowledge of the nature and some of the background of this admitted discrimination—knowledge which apparently was not possessed by the officers and directors of Peoples Bank at the time when the condition was prescribed by the defendants—I have been asked to supply some of the more important factual details to the end that the Court may have a clear understanding of the significance of defendants' admission.

It appears from the affidavit of W. M. Parker, Secretary of Peoples Bank, submitted in support of this motion, that notification of the Board of Governors' disapproval of the original application of Peoples Bank for admission to membership in the Federal Reserve System was given by letter signed by Chester Morrill, Secretary to the Board, dated February 14, 1942. That letter stated no reason for the Board's disapproval. It is therefore significant that on the same day, February 14, 1942, the same Mr. Morrill, in behalf of the same Board of Governors, addressed another letter to Transamerica Corporation of which a copy, marked Exhibit No. 14, is annexed hereto and incorporated herein. That letter did not purport on its face to refer to the Peoples Bank application but the last two paragraphs seem to explain fully both the reason for Condition No. 4 and the manner in which it was brought into being. For the convenience of the court such paragraphs are quoted herein as follows:

"The Board's position in this matter is in accord with the policy, upon which there is unanimous agreement by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Federal bank supervisory agencies should, under existing circumstances,

decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group.

"Please see that all persons in the Transamerica group who may be concerned with this policy are advised accordingly."

70 On behalf of Transamerica Corporation I replied to said letter of February 14, 1942 by a letter addressed to the Board of Governors of the Federal Reserve System, dated March 17, 1942. A copy of such reply, marked Exhibit No. 15, is annexed hereto and incorporated herein.

By a letter dated July 13, 1942, addressed to Transamerica Corporation and signed by R. B. West, Vice President of the Federal Reserve Bank of San Francisco, the continuance of the policy announced in Mr. Morrill's letter of February 14, 1942 was confirmed. That letter further confirmed that Mr. Leo T. Crowley, Chairman of the Federal Deposit Insurance Corporation, had discussed such policy with the Board of Governors and was "in complete accord". A copy of Mr. West's letter of July 13, 1942 is annexed hereto, marked Exhibit No. 16, and incorporated herein.

I replied to the last mentioned letter by a letter dated August 8, 1942, addressed to the Board of Governors of the Federal Reserve System. A copy of such letter is annexed hereto, marked Exhibit No. 17, and incorporated herein.

A further protest against the action so taken by the Board of Governors was made to the defendant Eccles as Chairman of such Board by a letter dated August 17, 1942, signed by A. P. Giannini, Chairman of the Board of Directors of Transamerica Corporation. A copy of that letter is annexed hereto, marked Exhibit No. 18, and incorporated herein.

71 The defendant Eccles replied to Mr. Giannini's letter of August 17, 1942 by a letter dated November 13, 1942. A copy of such letter is hereto annexed, marked Ex-

hibit No. 19, and incorporated herein. The first sentence in the next to the last paragraph of Mr. Eccles' letter reads as follows:

"It is our understanding that the position of the Comptroller of the Currency in this matter, referred to above, remains the same. We are advised that the Federal Deposit Insurance Corporation has indicated its unwillingness under existing circumstances to insure any newly organized State nonmember bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System. * * *"

To the best of my knowledge and belief, that statement made by a letter dated November 13, 1942, was the first occasion upon which any of the defendants or any one in their behalf made known to Transamerica Corporation that the Federal Deposit Insurance Corporation had agreed with these defendants to refuse to insure "any bank in the (Transamerica) group which may withdraw from the Federal Reserve System". Plaintiff, Peoples Bank, was then and is now the only bank in which Transamerica Corporation has any interest which has been subjected to a condition purporting to require it to withdraw from the Federal Reserve System as a result of some circumstance beyond the control of such bank. The quoted statement is a direct threat by the defendant Eccles that if Condition No. 4 should be invoked against Peoples Bank that bank would be unable to obtain Federal Deposit Insurance.

Mr. A. P. Giannini replied to said letter of November 13, 1942 by a letter addressed to the defendant Eccles, as Chairman of the Board of Governors, dated November 25, 1942. A copy of such letter is annexed hereto, marked Exhibit No. 20, and incorporated herein.

Receipt of the last mentioned letter was acknowledged by the defendant Eccles by a letter addressed to Mr. Giannini dated December 19, 1942, a copy of which is annexed hereto, marked Exhibit No. 21, and incorporated herein.

Under date of March 3, 1943, the defendant Eccles addressed a letter to Mr. A. P. Giannini, as Chairman of Bank of America N. T. & S. A., purporting to set forth "personal observations that have not been discussed with the other members of the Board" as to the reason for his views respecting "the kind of 'financial policy' referred to in recent correspondence and discussions." A copy of Mr. Eccles' letter of March 3, 1943, is annexed hereto, marked Exhibit No. 22, and incorporated herein.

Mr. A. P. Giannini replied to Mr. Eccles' letter of March 3, 1943 by a letter dated March 25, 1943, setting forth actual facts and figures upon the subjects mentioned in Mr. Eccles' letter. A copy of such letter of March 25, 1943, is annexed hereto, marked Exhibit No. 23, and incorporated herein. To the best of my knowledge and belief, the defendant Eccles has never replied to said letter of March 25, 1943, nor in any way disputed the correctness of any of the facts and figures therein set forth.

73 I am informed by counsel for the plaintiff that the originals of all of the letters hereinabove referred to from Mr. Morrill and Mr. Eccles will be available in Court upon the argument of this motion for summary judgment for inspection by the Court, if desired.

I have personal knowledge of the correspondence hereinabove referred to and of the facts embraced therein. The admittedly arbitrary, unreasonable, capricious and discriminatory character of Condition No. 4 is thus substantiated by documentary evidence that:

1st: The defendants have never purported to base the prescription of Condition No. 4 upon any authority of law;

2nd: They informed Transamerica Corporation for the first time, more than six months after the imposition of Condition No. 4 upon Peoples Bank, and apparently did not inform Peoples Bank even then that there had been an agreement between the Defendants and the Federal Deposit Insurance Corporation that Peoples Bank would be refused on a direct application for Federal Deposit Insur-

ance in the event that Condition No. 4 should be enforced;

3rd: The basis for Condition No. 4 was a purported "policy" adopted by secret agreement among defendants, Mr. Leo T. Crowley, Chairman of the Board of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency;

4th: Such "policy" has no qualitative basis whatever and has never been defined except in terms of bald and arbitrary prohibition and restriction applicable alone to
74 Transamerica Corporation and Bank of America
N. T. & S. A. It is not a policy at all, but a cloak for oppression; and

5th: That neither Transamerica Corporation nor Bank of America has ever been a party to any proceeding of any character before any of the agencies referred to wherein any such "policy" was or could have been promulgated or imposed as a legal conclusion or incident.

Having had occasion to participate in the correspondence between the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of San Francisco, the Secretary of the Board and members thereof, I have paid particular attention to various official expressions concerning the authority of the Board in matters embraced within the scope of Condition No. 4. Matters of public record which demonstrate that in exacting Condition No. 4 the said Board knew that it was acting without authority of law are referred to below, annexed as exhibits hereto and for the convenience of the court incorporated herein.

1. Four extracts from Pages 34, 35 and 37 of the 30th Annual Report of the Board of Governors of the Federal Reserve System covering operations for the year 1943 (annexed hereto, marked Exhibit No. 24, and incorporated herein).

2. Extracts from testimony of defendant Eccles given on April 5, 1943 before the Committee on Banking and Currency of the House of Representatives in a hearing on HR1699, a bill to amend Sections 12B and 19 of the Federal

Reserve Act (annexed hereto, marked Exhibit No. 25, and incorporated herein).

75 3. Extracts from testimony of defendant Eccles given on May 10, 1943, at a hearing before the Committee on Banking and Currency of the House of Representatives on HR2634, a bill relating to Collateral Security for Federal Reserve notes (annexed hereto, marked Exhibit No. 26, and incorporated herein).

4. Extracts from Testimony of Mr. Leo T. Crowley, with whom, as hereinabove indicated, Mr. Eccles has stated he had an agreement about these matters, given on April 1, 1943 before the Committee on Banking and Currency of the House of Representatives in a hearing on the aforesaid HR1699 (annexed hereto, marked Exhibit No. 27, and incorporated herein).

5. Extracts from the testimony of counsel for the Board of Governors, speaking officially for the Board, on September 25, 1945 at hearings before Sub-Committee No. 3 of the Committee of the Judiciary, House of Representatives, on HR 2357, a bill which was sponsored by these defendants for the purpose of increasing their admittedly limited powers (annexed hereto, marked Exhibit No. 28, and incorporated herein).

So far as I am informed and as the fact appears from the official records of the Congress of the United States no bill, for the purpose of increasing the admittedly limited powers of these defendants, has yet been passed by the Congress.

W. L. ANDREWS

Sworn to before me this 6th day of April, 1946:

JOHN A. BURNS

*Notary Public in and for the
City and County of San Francisco,
State of California.*

My Commission Expires April 12, 1949.

Filed Apr 15 1946

Exhibit No. 14

Board of Governors of the Federal Reserve System
Washington

February 14, 1942

Transamerica Corporation,
San Francisco, California.

Gentlemen:

The Board has recently received through the Federal Reserve Bank of San Francisco a copy of a letter from a member bank, control of which was recently acquired by your Corporation, stating that the member bank has under consideration the establishment of several branch banks and that the letter is written for the purpose of securing the necessary approval from the Federal Reserve Board. The member bank's letter set forth certain facts with respect to proposed branches at two locations and stated that the letter would be supplemented by such formal applications as Federal Reserve regulations may require.

The Board gave careful consideration to the information submitted and to other pertinent information in its files and reached the conclusion that it should not approve the establishment of the proposed branches on the basis of the information now before it. The Federal Reserve Bank of San Francisco was requested to advise the member bank accordingly.

Should your Corporation have any plans for the further expansion of its interests in banks, either directly or indirectly, through the mechanism of extending loans to others for the purpose of acquiring bank stock, or in any other manner, you are requested to advise the Board through the Federal Reserve Bank of San Francisco before any such plans are consummated.

The Board's position in this matter is in accord with the policy, upon which there is unanimous agreement by the

Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Federal Bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group.

Please see that all persons in the Transamerica group who may be concerned with this policy are advised accordingly.

Very truly yours,

CHESTER MORRILL,
Secretary.

78

Filed Apr 15 1946.

Exhibit No. 15

Transamerica Corporation
San Francisco, California,

March 17, 1942.

Board of Governors of the
Federal Reserve System,
Washington, D. C.

Gentlemen:

We have carefully considered, and have reviewed the statutes in connection with, your letter of February 14th forwarded to us by the Federal Reserve Bank of San Francisco in a letter dated February 21, 1942.

We note that it is desired that the Board of Governors be advised of any plans of this corporation to expand its interests in banks in any manner before such plans are consummated. We have always furnished any information requested respecting our investments and have permitted the examinations and have regularly rendered the reports re-

quired by law, but we are unable to find any requirement of law or regulation that information regarding our plans to acquire stock be communicated to the Board of Governors before any such plans are consummated. It does not seem to us that it would be practical to do so.

The acquisition of interests in banks, whether it be by the purchase of stock or otherwise, appears to be a matter within the responsibility and discretion of the directors and management of the corporation. It is believed that the directors and management could not properly surrender that responsibility because to do so would be to fail in their obligation to stockholders to conduct the affairs of the corporation according to their best judgment.

We note also the statement of the Board of Governors that "the Board's position in this matter is in accord with the policy upon which there is unanimous agreement by the Board, the Comptroller of the Currency and the Federal Deposit Insurance Corporation, that the Federal bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A. or any other unit of the Transamerica group."

79 While this corporation is not itself engaged in the banking business and therefore is not directly concerned with the establishment of additional banking offices, it cannot, on the basis of its present understanding of the statutes, accept such a ruling on behalf of itself or any bank in which it owns any interest.

We are one of a considerable number of bank holding companies doing business subject to laws enacted by Congress which were intended to have uniform application. Our present disposition would be not to object if Congress should determine to impose the death sentence on bank holding companies, even though it would be necessary to us to readjust our affairs in accordance with the law. We would even be willing to give consideration to some general plan

which would contemplate that there would be no additional branches granted to any bank for the duration of the war. In the meantime, however, we believe that we are entitled to and are assured fair and impartial treatment, and we cannot acquiesce in special treatment which appears to be contrary to the policy of the law as it now exists.

Federal statutes provide that national banks and state member banks are entitled to establish new branches when the law of the state grants the right, subject only to the approval of the particular supervisory agency to which the application is required to be made and the statutes prescribe the matters to be considered upon each such application. It is difficult to understand upon what basis the Board of Governors or any group of Federal Agencies can state in advance of any application that as to certain banks it will refuse to entertain an application to establish branches. It seems to us that the statutes require the respective Federal agencies to consider upon its merits any application made and there does not seem to be any basis for the advance rejection of any application for branches by any bank for the sole reason that this corporation has an interest in it.

Respectfully yours,

W. L. ANDREWS,
Vice President and Treasurer.

80

Filed Apr 15 1946

Exhibit No. 16

Federal Reserve Bank of San Francisco

July 13, 1942.

Transamerica Corporation,
San Francisco, California.

Dear Sirs:

Reference is made to the formal application, dated June 10, 1942, of the First Trust and Savings Bank of Pasadena to the Board of Governors of the Federal Reserve System

for its approval of the establishment of branches at Temple City and Alhambra, California.

The First Trust and Savings Bank of Pasadena first wrote to us in January, 1942 concerning its plans for the establishment of branches at these places, which letter was forwarded to the Board of Governors for its information and consideration. After careful consideration, the Board reached the conclusion that it should not approve the establishment of the proposed branches, and in its letter to you, dated February 14, 1942, the Board informed you of the action taken.

We are now advised by the Board that it has given careful consideration to the present application of the First Trust and Savings Bank of Pasadena for the establishment of branches at Temple City and Alhambra, and to the data submitted, but it does not feel that the facts submitted and the circumstances in the case justify any change in its policy as outlined in the previous correspondence above referred to. The Board further states that this matter has been fully discussed with Mr. Leo T. Crowley, Chairman of the Federal Deposit Insurance Corporation, and that he is in complete accord with this conclusion.

The views expressed above are transmitted to you at the request of the Board of Governors of the Federal Reserve System.

Very truly yours,
(signed) R. B. WEST
Vice President.

Filed Apr 15 1946

Exhibit No. 17

Transamerica Corporation

August 8, 1942.

Board of Governors of the
Federal Reserve System,
Washington, D. C.

Gentlemen:

We have received a letter dated July 13, 1942, from the Federal Reserve Bank of San Francisco, in which it is stated that the Board of Governors of the Federal Reserve System has determined to deny the application of the First Trust and Savings Bank of Pasadena to establish branches at Temple City and Alhambra for the reason that it has come to the conclusion that circumstances do not justify any change in the policy referred to in its letter of February 14, 1942, to Transamerica Corporation. In that letter the Board of Governors stated that in conjunction with the Comptroller of the Currency and the Federal Deposit Insurance Corporation it had determined upon a policy to decline permission for the acquisition of any additional banking offices by Transamerica Corporation or by any bank in which Transamerica Corporation was interested.

As we stated in reply to the previous letter from the Board of Governors, there does not appear to us to be any proper basis in law upon which the Board of Governors can reject an application for branches by any bank for the sole reason that this corporation has an interest in it. This seems to be particularly true in the case of the First Trust and Savings Bank of Pasadena, in which this corporation owns but 60 per cent of the outstanding stock. We believe that the reason assigned is not a lawful one as a basis for the rejection of an application and for that reason is capricious and discriminatory and is prejudicial not only to the First Trust and Savings Bank of Pasadena but also to the

shareholders of that bank, whether they be Transamerica Corporation or the owners of the minority interest in the bank.

Yours very truly,

W. L. ANDREWS,

Vice President and Treasurer.

Filed Apr 15 1946

Exhibit No. 18

August 17, 1942

Honorable Marriner Eccles, Chairman,
Board of Governors,
Federal Reserve System,
Washington, D. C.,

Dear Marriner:

I have been thinking over the communications that we have received from the Federal Reserve System during recent months and I find it difficult to reconcile the position taken by you and your associates with the assurances given to us when we had occasion to discuss the possibility of converting the Bank of America from the national to the state system. Both you and John McKee properly stated that our interests could count upon receiving the same fair and impartial treatment from the Federal Reserve Board as is accorded to any other institutions. This conflicts sharply with the views expressed in the Board's letter of February 14, 1942, addressed to Transamerica Corporation, in which the Board takes the position that, regardless of its merits, an application from any institution in the Transamerica group, or in any way connected with it, would receive an adverse ruling from the Board, this decision as to procedure having been reached in collaboration with the Comptroller and the Federal Deposit Insurance Corporation. In a subsequent letter to the Corporation from the Federal Reserve Bank, dated July 13, this arbitrary position of the Board is confirmed by the rejection of the appli-

cations of the First Trust and Savings Bank of Pasadena without any apparent reason even though the Superintendent of Banks of California had granted unconditional permits for the branches after finding that public convenience and advantage would be promoted thereby.

It must be obvious to you that such a position is not only discriminatory, but also injurious to Transamerica Corporation, and causes an adverse reflection on it, and it is also injurious to the minority stockholders in banks in which Transamerica Corporation holds an interest, as well as to the banks themselves.

We do not know of any legal justification for such action, and you failed in your letter to indicate what information, if any, you have, in your files that would warrant it.

Practically all the members of the Board know me well enough, I think, to realize that when I have anything on my mind I do not hesitate to speak it out as frankly and directly as I can, and I feel it is only reasonable to expect the Board to adopt the same attitude toward me and tell me frankly what is the basis for its discriminatory treatment of the interests with which I am so closely connected. I doubt if

83 there is any bank of comparable size in the country that is any more liquid or in a more sound and healthy condition than Bank of America, and I think that a careful review of the last examination made of Transamerica Corporation by the Federal Reserve System will indicate that this Corporation also is in a sound condition, and the same applies to all of the banks in which it has an interest. At least, we did not note any serious criticism in reviewing the examination of Transamerica Corporation. Frankly, I should like to know what is the cause, imaginary or otherwise, of this discrimination; whether it be the condition of our institutions, their managements, or any other circumstance.

In the past ten years during which I have been responsible for the direction of the affairs of the Bank of America, on the national bank examiner's basis, exclusive of the preferred stock issue, it has added more than \$57,500,000 to its

net sound capital structure over and above dividends paid in that period which aggregated \$74,214,042.14, and which were fully justified.

While the growth of the bank has been rapid, other banks have grown rapidly too, some, in fact, more rapidly than our bank; and yet there is no apparent attempt to discriminate against those other banks. It should be obvious that our position, if anything, is stronger than that of most of the other rapidly growing banks, due to the fact that to a large extent our business is made up of a great number of small accounts, over 2,500,000 an over-all average of less than \$765.00 per account, and deposits of more than \$900,000,000 are in the time category where they are not subject to withdrawal without notice in an emergency. I am sure you will recognize that this condition does not exist in the other large banks which have relatively few accounts, but which are subject to having practically all their deposits withdrawn over night. Most of these other large banks have few, if any, savings or time deposits, and, therefore, are more vulnerable. The greater portion of this bank's assets is represented by cash, investments in securities of the United States Government, and loans guaranteed by the Government, such as FHA and guaranteed defense loans. In all of our more than \$2,000,000,000 of assets, we have approximately only \$250,000,000 in commercial loans, a substantial portion of which is supported by government guaranties. Our real estate loans are relatively small loans averaging less than \$5,000 each, and virtually all of them are on an installment basis. The total of our investments and loans which are obligations of the United States Government and political sub-divisions, or are guaranteed by them, amounts to approximately \$1,038,000,000 and we have in addition, cash and cash items approximating \$400,000,000. Practically all of our assets could be sold at a premium which is not true of the other great banks of the country.

The banking premises which we own and occupy are all well situated in the center of the business districts of their

respective communities, and in the most valuable locations. The American Appraisal Company valued our premises toward the close of 1939, and arrived at a valuation figure greatly in excess of the carrying value of the properties on our books. We must not lose sight of the facts that

84 our premises are not all located in one community; that they are in the most desirable locations spread over the most rapidly growing and prosperous State in the Union, which State has experienced extraordinary population growth since the last census in 1940.

It is obvious that with such growth as is taking place in California, and that will continue to take place, additional banking facilities are necessary. I cannot understand why there should be this discrimination against us and our attempt to extend our services where the need has been definitely established when other institutions have no difficulty in opening new branches when they desire to do so.

The Bank of America, since its organization in 1904, has weathered all sorts of economic storms; I have seen it through several depressions and a bitterly contested proxy fight. Our correspondent banks and large commercial clients will testify to the fact that their experience in doing business with us has demonstrated to them that we have the best banking organization in the country, and I defy anyone to point out a more sound bank or competent management anywhere. With the greatest portion of our assets in cash, or guaranteed by, or consisting of, obligations of the United States Government and political subdivisions, and a proven earning power I challenge any of the bank supervisory agencies to point out a comparable situation.

Our other real estate owned amounts to the relatively insignificant figure of \$4,800,000. The land contracts of Capital Company have a present balance of \$16,670,530.74, and are the unconditional obligations of the company, which has a net capital structure of more than \$33,459,000. Through such contracts, real estate of more than \$55,000,000 has been liquidated, and most of this was acquired

through loans made by institutions taken over by us, in many cases at the request of banking authorities and to save the depositors from loss.

You are familiar with the fact that the Bank of America was compelled to take preferred stock when it did not need it, as we contended at the time, and our arguments in this respect have been overwhelmingly substantiated by subsequent events. Our institution took no advantage of charging off its assets at the time of the moratorium and offsetting such charge offs with preferred stock because we knew that such action was not necessary and that it imposed an unnecessary burden on the Government and an unjustifiable charge against the earnings of the bank. On the preferred stock that we were compelled to take, we have paid approximately \$2,000,000 in dividends and have derived no benefit in return. The bank would certainly have been much better off to have added that \$2,000,000 to the more than \$40,000,000 added to the net sound capital structure, on the examiner's basis, in the past three years.

85 The only reason that I can ascribe to the Board's continued refusal, outside the law, to permit the normal extension of our services to places where banking service is obviously needed, is because it does not like the management. In my opinion there is certainly no justification for this attitude. This management took over the bank after the bitter proxy fight I have mentioned, and all of the losses which during the time of the moratorium would have been charged off by other banks through the medium of preferred stock were subsequently charged off by us out of earnings. We have had the extraordinary experience of surviving earthquakes, fire, panics, depressions, the moratorium, conspiracies, and a bitter proxy battle, and have stood up under constant harassment on the part of the bank supervisory authorities, and other Federal Agencies, and yet here we are today with capital funds, exclusive of preferred stock the greatest in the history of the bank, and our earning capacity unexcelled by any other bank. Only a sound and properly managed institution could have survived.

No bank in the country has cooperated more fully with the Government than the Bank of America, and in recognition of this fact the Treasury Department, despite the strenuous controversies of the past, has seen fit to award it the first citation to be issued to any bank in the United States for merit in promoting the war effort. We have sold more individual defense and war bonds than any other bank, at a continuing cost to this institution of more than \$30,000 a month. Enclosed is the most recent report showing daily sales of bonds. We have financed war industries before and after Regulation V became operative to an extent not exceeded by any other bank. In the FHA program, we led the field and showed the way for other banks to cooperate; and, today, we lead the Nation in the volume of all types of FHA loans made and in cooperating with this administration in its other programs; and we are 100% behind the Government's program to win the war.

I do not think that any bank in the history of this country has been more persistently persecuted than the Bank of America. Can it be due to the fact that we do not represent the vested interests, and that throughout its history it has been a bank of the people, owned by many thousands of small stockholders? Or can it be that there is a more sinister motive? I hope for the sake of the future well-being of our country that this is not the case.

I must state to you frankly, Marriner, that I think the position of the supervisory agencies is not sound and in the long run cannot be sustained under our American system of free enterprise. Let us not expend our time and energies in contending over that fundamental of freedom-loving people of equality under the law. It seems inappropriate that governmental agencies should at this time be reaching out to usurp the legislative prerogatives, when there is so much need for the exercise of administrative functions to preserve the very existence of the Nation. If you do not like the existing laws, let us try to change them by

86 constitutional means. We should not in these times resort to Nazi-Fascist methods of dictatorship.

This institution is certainly no instrument of evil, as the action of the Board toward it would seem to imply. Through the years, it has exercised consistently a beneficent and constructive influence on the welfare of the state and nation and the great number of Californians that it serves.

I think that in justice you should exert your influence to have the Federal Reserve Board subscribe to the spirit of fair and impartial treatment to which you have so frequently subscribed in the past. Won't you please let me know what you can do about it? If it is a matter of some technicality that is involved, can we not resolve that by agreeing to a friendly legal proceeding for a declaratory judgment defining the powers and authority of the Board, or for clarification of the statutes if they are ambiguous?

I should like to have your cooperation in seeking freedom from prejudice and discrimination and the attainment of the liberties which we as a nation are sacrificing and fighting to preserve for ourselves, and to secure for others.

With kindest personal regards to you.

Yours very sincerely,

A. P. GIANNINI

87 (Attached to Mr. A. P. Giannini's letter of August 17, 1942 to Marriner Eccles)

War Savings Bond Sales for Friday August 14, 1942

Series E	\$528,731.25
Series F	21,848.50
Series G	65,800.00

Total\$616,379.75

Total amount to date as of the close of business August 14, 1942—\$131,532,860.75.

88

Filed Apr 15 1946

Exhibit No. 19**BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM**

Office of the Chairman
November 13, 1942.

Dear A. P.:

This is in reply to your letter of August 17, 1942, with reference to the action of the Board of Governors in denying the application for the establishment of branches at Temple City and Alhambra by the First Trust and Savings Bank of Pasadena, which is controlled by Transamerica Corporation through the ownership of a majority of the capital stock. Your letter was acknowledged by Mr. Clayton under date of August 21, 1942, immediately after I had left Washington for a few weeks' trip to the West.

Since returning to Washington, a great many pressing matters, including war financing, have taken up my entire time. Consequently, I have only recently had an opportunity to consider with Governor McKee, to whom you referred in your letter, and the other Members of the Board and some of its staff certain statements and charges contained in your letter, with which we cannot possibly agree.

For some time prior to January, 1942, the Comptroller of the Currency had repeatedly refused to approve expansion in the number of branches of important national banks in the Transamerica Corporation group. Shortly before that date, Transamerica Corporation obtained control of the First Trust and Savings Bank of Pasadena. In January, 1942, that bank wrote a letter to the Federal Reserve Bank of San Francisco, stating, among other things, that it had "under consideration the establishment of several branch banks," Temple City and Alhambra being mentioned specifically.

In view of previous discussions and understandings, the Board was surprised to learn of these plans for expansion. On February 14, 1942, it requested of the Federal Reserve Bank that the First Trust and Savings Bank of Pasadena be advised, before it took any further steps to consummate its plans, that the Board had given careful consideration to the information submitted and to other pertinent information in its files and had reached the conclusion that it should not approve the establishment of the proposed branches on the basis of the information before it. The Board also considered it desirable to inform Transamerica Corporation directly of the action on the Pasadena application and to express again to its management the Board's views in the matter of expansion. Accordingly, on the same date it addressed a letter to the Corporation in which it was stated:

"Should your Corporation have any plans for the further expansion of its interests in banks, either directly or indirectly, through the mechanism of extending loans to others for the purpose of acquiring bank stock, or in any other manner, you are requested to advise the Board through the Federal Reserve Bank of San Francisco before any such plans are consummated."

"The Board's position in this matter is in accord with the policy, upon which there is unanimous agreement by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Federal bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group."

"Please see that all persons in the Transamerica group who may be concerned with this policy are advised accordingly."

Nevertheless, the First Trust and Savings Bank of Pasadena thereafter continued its plans and on February 28, 1942, entered into a contract to assume deposits and take over assets of the Temple City National Bank, with a view to operating a branch at that location. On June 10, 1942, the bank filed a formal application for the establishment of branches at Temple City and Alhambra. On July 10, 1942, the Board declined this application and requested that the bank and Transamerica Corporation be advised accordingly.

It is our understanding that the position of the Comptroller of the Currency in this matter, referred to above, remains the same. We are advised that the Federal Deposit Insurance Corporation has indicated its unwillingness under existing circumstances to insure any newly organized State nonmember bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System. As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest, it will consider as unsound their efforts to continue an expansion program by whatever means, including the organization of new State banks, the acquisition of control of existing State banks, or the conversion of national banks to State banks, and the establishment of branches thereof. In addition, where the change or conversion from one jurisdiction to another is for the purpose of avoiding proper restrictions or requirements of other Governmental agencies, the Board does not propose to be used as a means of avoiding such restrictions or requirements, considered by the Board to be justified under existing circumstances.

The foregoing will indicate some of the more important considerations underlying the Board's position in this matter. In view of our previous discussions with representatives of your organizations, it is felt unnecessary to go into further detail. However, as you well know, whenever you

or any of your associates feel that you have a just grievance to take up with the Board, or that you have some additional information to assist the Board in its deliberations, you are always welcome to call in person for a more complete and frank discussion than is practicable through correspondence.

Sincerely yours,

(signed) M. S. ECCLES
Chairman

Mr. A. P. Giannini,
Chairman of the Board,
Transamerica Corporation,
San Francisco, California.

91

Filed Apr 15 1946

Exhibit No. 20

November 25, 1942

Hon. Marriner S. Eccles, Chairman,
Board of Governors of
Federal Reserve System,
Washington, D. C.

Dear Marriner,

I wish to acknowledge receipt of your letter of November 13 which was written in reply to my letter of August 17, 1942. I trust that in what I shall have to say concerning your reply I shall not seem to be unduly critical for I have no other thought than that of sincerely attempting to arrive at a basis of understanding.

In so far as your letter reviews correspondence which has taken place between the Board of Governors and Transamerica Corporation, and in so far as it recites the now historical facts with reference to the Comptroller's repeated refusals to approve branches of important national banks in the Transamerica group, while granting them to competitive institutions, it recites facts with which we are both entirely familiar.

But those matters are somewhat beside the main point of the inquiry which I addressed to you in August. I think if you will read my letter again you will be impressed with the earnestness of my desire to know why and upon what basis, legal or otherwise, action has been taken which precludes banks in which Transamerica Corporation has an interest from transacting their business upon the same terms and upon an equality with other banks. The correspondence to which you refer, some of which you quote in your letter, appears to me to show that the Board of Governors of the Federal Reserve System, the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller of the Currency have entered upon a course of arbitrary and discriminatory action where Transamerica is concerned. I was hopeful that your reply, instead of reiterating the circumstances which appear to show this, would enlighten me as to any existing foundation which might be relied upon to justify the course which has been pursued for some time.

You quote from the Board's letter to Transamerica of February 14, 1942, in which your Board advises Transamerica that on the basis of information submitted and other pertinent information in its files it has reached the conclusion that it should not approve the establishment of proposed branches of the First Trust and Savings Bank of Pasadena. We have as yet no knowledge of what the "other pertinent information" referred to by the Board consists, and we regard the facts accompanying the application to show beyond question a basis for approval such as would be granted in the case of any other applicant.

92 You also quote that portion of this letter of notification which states that the Board's position is in accord with the policy which has been agreed to by the Board, the Comptroller and the Federal Deposit Insurance Corporation to deprive Transamerica Corporation or any bank in which it has an interest of the benefit of the law under which a bank may properly conduct its business, including the laws providing for the establishment of additional branches for the convenience of patrons and the pub-

lie. I am still at a loss to know the basis for this policy and I have been amazed to find that it would be agreed upon, declared and put into effect without any opportunity for the interested parties to be heard or even to know the circumstances relied upon to justify it. I wish that you would write me and enlighten me upon this score.

Instead of aiding in an effort to reach common ground, your letter would seem to introduce an additional obstacle to mutual understanding. You say: "As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest" it will consider as unsound any effort to expand its banking business. Perhaps we have been mistaken in believing that matters of public policy were the primary concern of the legislative bodies rather than of the administrative boards or officers. We have always earnestly endeavored to bring our activities into accord with the public policy evidenced by the various statutes applicable to the particular business. It would seem that if in order for banks in which Transamerica Corporation is interested as a stockholder to conduct a banking business on terms of equality with others engaged in the same business we must first satisfy the Board of Governors of the Federal Reserve System that the financial policies of the Corporation are consistent with the Board's view of the public interest, we should at least be advised as to what that view is.

Your letter contains a sentence, the implications of which are so utterly foreign to any purposes of mine, that I cannot let it pass unchallenged. You say: "In addition, where the change or conversion from one jurisdiction to another is for the purpose of avoiding proper restrictions or requirements of other Governmental agencies, the Board does not propose to be used as a means of avoiding such restrictions or requirements, considered by the Board to be justified under existing circumstances." I am completely at a loss to understand what you are driving at. I know I have never even remotely suggested to you or to the Board

that there was any thought of using it as a means of avoiding any proper restrictions or requirements of other governmental agencies. In my experience with governmental agencies I confess I have at times felt—yes, been convinced to the point of firm conviction—that improper restrictions and requirements have been attempted to be imposed and that at times institutions with which I have been connected have been victims of arbitrary and discriminatory action. I recall expressing such convictions to you. I have always attempted to correct such unfortunate situations in so far as it was possible to do so, but I have never objected to the full and proper exercise of supervisory discretion legally vested in any public supervisory authority. I well know that I have never suggested to you or to any one else in authority a proposal to use the Board or any other authority for the purpose of avoiding any *proper* restrictions or requirements. I think you will recall, too, that at one time when we were contemplating converting to a state member bank your attention was specifically directed to the various provisions of the law with respect to approval of branches and inquiry was made as to whether or not the Board would be likely to be governed by the standards stated in passing upon such a matter or whether foreign considerations would be deemed controlling. But I have never at any time suggested that legal standards for the exercise of discretionary action by supervisory authorities be departed from.

While your letter is distinctly disappointing in the respects which I have indicated above, you may rest assured that I shall exert every effort to bring about such an adjustment in the relations of the institutions with which I am associated and all appropriate supervisory authorities as may be consistent with justice and fairness to all.

As stated before, Transamerica Corporation cannot submit to discrimination. As a basis for mutual understanding in which all thought of discrimination would be permanently eliminated, it would seem proper that you should ad-

wise me of any information which your Board has regarded as pertinent in deciding the matters referred to in your communications. May I hear from you soon?

Sincerely yours,

A. P. GIANNINI

P. S.

With regard to the references in your correspondence to the expansion of the interests of Transamerica in banks you might be interested in taking note of the fact that on December 31, 1931, shortly before I was returned to its management, the investments of Transamerica Corporation in national banks, member banks and state nonmember banks aggregated \$139,488,939.53 and that as of September 30, 1942 the similar investment was \$65,067,736.87. It had decreased 53%. You might also be interested in noting that as of December 31, 1940, the investment stood at \$83,521,086.49 and that since that time it has decreased approximately \$9,000,000 per year to the amount as of September 30, 1942 of \$65,067,736.87, or a decrease in the past two years of 22%.

A.P.G.

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Filed Apr 15 1946

Exhibit No. 21

Board of Governors of the Federal Reserve System

December 19, 1942.

Mr. A. P. Giannini,
Chairman of the Board,
Transamerica Corporation,
San Francisco, California.

Dear A.P.:

I have yours of November 25 in which you acknowledge receipt of my letter of November 13 respecting the position of the Board in the matter of expansion of banking institutions in the Transamerica group.

I could not possibly agree with you that the Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency have entered upon a course of arbitrary and discriminatory action where Transamerica is concerned nor could I possibly agree that any policy has been declared and put into effect without any opportunity for the interested parties to be heard. I believe that you are fully informed as to the Board's position and of all the facts upon which it is based, and I am convinced that continued discussion would only involve us in lengthy arguments as to the correctness of your impressions regarding the soundness of the Board's position and the sincerity of its motives. However, any time you or any of your senior associates are in Washington, I shall be glad to arrange further conferences on this matter.

With kind personal regards, I am

Sincerely yours,

(signed) M. S. ECCLES
M. S. ECCLES,
Chairman.

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Filed Apr 15 1946

Exhibit No. 22

Board of Governors of the Federal Reserve System
Washington

Office of the Chairman
March 3, 1943.

Mr. A. P. Giannini,
Chairman,
Bank of America N. T. & S. A.,
San Francisco, California.

Dear A.P.:

In looking over the published statement of Bank of America as at December 31, 1942, and the changes from December 31, 1941, several matters interest me. Most con-

spicuous is the tremendous growth in demand deposits of \$625 million odd, which, together with \$52 million odd of savings and time deposits, produced an over-all deposit growth for the year of over \$677 million. In stark contrast to that increase, however, was the insignificant increase of \$23,716 in the total capital funds of the bank.

I realize that no bank located in a war production area can be expected to increase its capital funds in any normal proportion to its deposit growth. On the other hand, the small addition referred to hardly indicates conservative management and might be considered an example of the kind of "financial policy" referred to in recent correspondence and discussions. In a situation of this kind, it might well be desirable to reduce dividends so as to add a reasonable amount to total capital funds.

The foregoing are personal observations that have not been discussed with the other Members of the Board. I felt at liberty, however, to pass on these thoughts, feeling sure you would take them in the spirit in which they are given.

With best wishes, I am

Sincerely yours,
/s/ M. S. ECCLES
M. S. ECCLES,
Chairman.

Filed Apr 15 1946

Exhibit No. 23

San Francisco, California
March 25, 1943

Honorable Marriner S. Eccles,
Chairman, Board of Governors,
Federal Reserve System,
Washington, D. C.

Dear Marriner :

I would have been pleased to have discussed with you and all those present at our February conference in Washington.

the subjects raised in your letter to me of March 3. In the circumstances, however, I shall gladly give you in writing the most pertinent facts and my conclusions with reference to the growth of deposits of Bank of America in 1942, its capital structure and the bank's financial policy.

It is true that the Bank of America experienced a tremendous growth of deposits in 1942, but it is also true that the circumstances which resulted in the growth of deposits generally are regarded as abnormal, and I understand the supervisory agencies have agreed that capital funds are not expected to be maintained in proportion to deposit growth, and you, too, so state in your letter.

If you are inclined to be critical of our "financial policy" it would perhaps be well to consider some additional facts which enter into that policy. While gross deposits increased during the year from \$1,908,384,000 to \$2,586,141,000 or \$677,756,000, there was an increase in cash of \$175,975,000 and in Government obligations of \$549,077,000, or a total increase in assets not involving credit risk of \$725,052,000. This increase more than off-sets the entire deposit growth. Government obligations, obligations of Federal agencies, and Municipals make up 97.6% of our entire bond account, and of the Governments \$358,194,000 are due within one year. In our corporate account 86.6% of the bonds carry a rating of triple B or better.

You have available the reports of examination of the bank over a number of years. If you will review them you will find that in the report of examination as of April 28, 1938, completed September 1938, which was the principal basis for the discussions resulting in the promulgation of the "Requirements of the Comptroller of the Currency", the examiner gave the bank a net sound capital structure of \$96,447,600. (We took exception to this and our judgment has been vindicated by subsequent events.) On the first examination in 1942, as of January 16, the examiner reported a net sound capital structure of \$152,474,224
 98 and in the next examination, as of July 31, 1942, \$156,052,055. Adjusted on the examiner's basis to

the end of 1942, the net sound capital structure would be \$159,835,233, or an increase in the period from *January 16, 1942 to December 31, 1942*, of approximately \$7,400,000. In the period from *April 1938 to the end of 1942*, the *improvement in net sound capital structure* on the examiner's basis, exclusive of outstanding preferred stock, is *more than \$40,000,000*.

At December 31, 1942, substantially all losses classified by the examiner had been provided for and the doubtful classification of assets aggregated less than \$1,140,000. In considering these figures, too, you should bear in mind the fact that during the year 1942 the already substantial margin of actual value of bank premises and other real estate over book carrying values was further increased by the use of \$2,437,617 of reserves to effect a reduction of the book value of those investments in addition to normal depreciation. This adjustment completed the observance of the Comptroller's requirements with regard to these items.

If you are inclined to make comparisons, I would suggest that you go a little deeper into the picture. Starting, let us say, with the capital structures of the five largest national banks in the United States at the year-end December 31, 1934 (the end of the first year following the banking holiday), and comparing their capital structures eight years later or at December 31, 1942, you would find that the Bank of America increased its capital funds \$60,465,000 or 60.5%; that the increase for the Continental Illinois National Bank & Trust Company was \$36,115,000 or 35.4%; First National of Chicago—\$16,706,000 or 25.17%; Chase National—\$19,720,000 or 8.37%; and the National City Bank—\$13,020,000 or 7.9%.*

In this group the Bank of America is the only bank which had outstanding any preferred stock at the end of 1942, the other four banks having previously retired in the aggregate \$175,000,000 of preferred stock. However, if the Bank of America had retired all of its preferred stock without otherwise altering its capital account, it would have increased its

* Authority for these figures is Moody's Banks, Insurance, Real Estate, Investment Trust Manual.

capital funds during the same eight-year period a net of \$37,425,200 or 37.4%. In other words, it would still have been the Number One national bank in the country with respect to the dollar increase in its capital account and, percentagewise, it would still have exceeded any of the other four large national banks.

If you care to pursue the like comparison still further, I would suggest that you compare this bank with other large banks in California and you would find this to be the situation:

Capital funds in this eight-year period of American Trust Company, including preferred stock of \$7,500,000 as of December 31, 1942, have increased \$3,633,000 or 16.08%; Crocker First National Bank—\$1,672,000 or 12.5%;

Farmers & Merchants Bank of Los Angeles—\$601,000 or 7.5%; Wells Fargo Bank & Union Trust Company—\$908,000 or 5.2%; and Security-First National of Los Angeles—\$604,000 or 1.1%. During the same period California Bank of Los Angeles retired 80% of its \$4,000,000 preferred stock and, treating an abnormal reserve in 1934 as capital funds, shows a decline of \$219,000 or a little more than 2% in its aggregate capital funds; and Bank of California N. A. of San Francisco decreased its capital funds \$326,000 or 2.2%.*

It should not be necessary for me to tell you or any other person experienced in banking that results such as are reflected in the above figures are not the product of theorizing or wishful thinking. They are the proofs of constructive policies and sound management.

In view of this situation and with the facts before you which I have stated in this letter, I think you will appreciate that there is a very substantial foundation for the complaint I have repeatedly stated to you and other supervisory authorities in Washington against this bank's being treated on an exceptional basis from others. To settle the question of capitalization so far as this bank is concerned once and for all, and to put an end to attempted discrimina-

* Authority for these figures is Moody's Banks, Insurance, Real Estate, Investment Trust Manual.

tion against it, I am perfectly willing to say now that this bank will conform to any ruling that will be made by competent authorities in Washington with respect to capitalization, provided only that such requirements are of general applicability.

I think you would be interested to know that our earnings continue at about the same level as in 1942, after making provision from earnings of \$300,000 per month for taxes. But there are some features with respect to our earnings position that have perhaps not been brought to your attention. We have, as you know, a very large volume of time deposits and in this period of low interest rates this gives us a position of flexibility with respect to the payment of interest on such deposits. Because of our satisfactory earnings we have been paying a rate in excess of that paid in other parts of the country and in 1942 our payments amounted to \$10,814,962. It would be possible for us at any time to lower our interest rates on time deposits or we might even discontinue payment of interest on such deposits altogether as many large banks in other parts of the country have already done. I do not say that this is in contemplation, but it is another favorable element in taking an over-all view of this bank.

I am pleased, Marriner, to discuss these matters with you. I know you are interested, and any mental reservations, such as your letter indicates, should be dispelled by this more complete information. I know that it is not your purpose simply to find something to complain about. Perhaps you will better understand from these facts why we are proud of the record of Bank of America and why we feel that supervisory authorities should not assume a discriminatory attitude towards it, but rather should treat it as an example for other progressive banks to follow. I should very much like to clear up once and for all the sources of irritation between this institution and supervisory agencies since they are quite unwarranted and since they have the effect of hampering the institution and its management in their war effort and in the constructive

development of this area. I think you can do a great deal to bring this about.

If you have any further thoughts I should be very glad to discuss them fully and frankly with you. I think you will not only understand why we are proud of our accomplishments in the past but will appreciate that on the record of its performance this institution gives promise of even greater accomplishments in the future.

May I again say that I enjoyed my visit with you and the members of the Board very much and that I await with deep interest the tangible results of our conference.

My best wishes to you and the gentlemen who participated in the conference.

Sincerely yours,

Chairman of the Board.

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Filed Apr 15 1946

Exhibit No. 24

EXTRACTS FROM THIRTIETH ANNUAL REPORT OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM COVERING OPERATIONS FOR THE YEAR 1943.

[p. 34] "Recommended Legislation On Bank Holding Companies.

"In the Banking Act of 1933 the Congress undertook to provide for the supervision of bank holding companies. The Board, in the light of its experience, believes the present law inadequate to accomplish the purposes for which it was enacted, * * *"

[p. 35] "* * * the only limitation which the law imposes upon the control of subsidiary banks by bank holding companies is that the latter may not vote their stock in a controlled bank without securing a voting permit from the Board, and it is only as an incident to obtaining the voting permit that there is any regulation at all. * * *"

[p. 37] "There is now no effective control over the expansion of bank holding companies either in banking or in

any other field in which they may choose to expand. * * *

It is recognized that bank holding companies have served a useful purpose in some areas of the country and have contributed banking services which might not otherwise have been available or might not now be available, and a requirement that bank holding companies be immediately dissolved would more likely result in the liquidation of controlled banks in certain areas than in their sale to and continued operation by new owners.

For these reasons the Board recommends that immediate legislation be enacted preventing further expansion of existing bank holding companies or the creation of new bank holding companies. * * *

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Exhibit No. 25

Filed Apr 15 1946

EXTRACTS FROM HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY, HOUSE OF REPRESENTATIVES, 78TH CONGRESS, FIRST SESSION, ON H. R. 1699, A BILL TO AMEND SECTION 12B AND SECTION 19 OF THE FEDERAL RESERVE ACT.

From testimony of Mr. Marriner S. Eccles, Chairman of the Board of Governors of the Federal Reserve System, on April 5, 1943.

[Page references are to official printed record of transcripts.]

[pp. 132-133] "Mr. Patman. Now, one question on this Trans-America Corporation. Have you given consideration to that set-up, Mr. Eccles?"

"Mr. Eccles. In what way?"

"Mr. Patman. In the way of it being a menace to the country?"

"Mr. Eccles. Well, I would not want to say it has been a menace to the country.

"Mr. Patman. Or it adopts a bad policy that, if pursued, would eventually become a menace?"

"Mr. Eccles. Are you referring to the Trans-America policy, or the Bank of America?

"Mr. Patman. I mean just exactly what I said—Trans-America.

"Mr. Eccles. I have given considerable thought to the operations and the development of Trans-America.

"Mr. Patman. Do you look upon that as a wholesome undertaking?

"Mr. Eccles. No, I do not. I agree that Trans-America, in their purchase of stock of banks and in their purchase of stock of corporations that have nothing whatever to do with banks is pursuing what, to my mind, is an improper and unsound policy.

"Mr. Patman. Do not you have some power and authority to deal with that situation?

"Mr. Eccles. We do not.

"Mr. Patman. Have you ever asked for any?

"Mr. Eccles. No, we have not. * * *

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Exhibit No. 26

Filed Apr 15 1946

EXTRACTS FROM HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY, HOUSE OF REPRESENTATIVES, 78TH CONGRESS, FIRST SESSION, ON H. R. 2634, A BILL TO EXTEND THE PERIOD DURING WHICH DIRECT OBLIGATIONS OF THE UNITED STATES MAY BE USED AS COLLATERAL SECURITY FOR FEDERAL RESERVE NOTES.

Testimony of Marriner S. Eccles, Chairman, Board of Governors of the Federal Reserve System on May 10, 1943.

[Page references are to official printed record of transcripts.]

[pp. 14-15] "Mr. Patman. Mr. Eccles, I do not want to take the time of the committee on this question, but I would like for you to say this one way or the other. I presume, however, that your answer is that unless you can get

better cooperation out of Transamerica you would look with favor upon advocating legislation that would curb the bank holding companies.

"Mr. Eccles. That would give the Board the power to require what they would consider a policy in the public interest.

"Mr. Patman. Now, you do not look with favor upon the activities of Transamerica Corporation, do you?

"Mr. Eccles. I do not. I would like to qualify that. I do not look with favor upon the acquisition by Transamerica of stock in concerns that have no relationship to banking, nor do I look with favor upon the acquisition by Transamerica of stock in independent unit banks as a means of evading the requirements of the Federal agencies who will not permit them to establish further branches. * * *

[pp. 20-21] "Mr. Ford. The Bank of America and Transamerica have made repeated charges that they have been discriminated against. Do you not think it would be a wise thing to have them up here before this committee and get the low-down on it?

"Mr. Eccles. I think it is up to this committee to determine that.

"Mr. Ford. It is up to the committee to determine that, but I am trying to get your off-side opinion on that.

104 "Mr. Eccles. If this committee wants to investigate them, I think they should pass a resolution that would recite the purposes for their being called up here, or a bill that deals with the holding-company situation should be introduced, and that would be a basis for holding hearings, and that would bring them up before the committee; but just merely to bring them up before the committee I do not think would serve a very useful purpose.

"Mr. Ford. Well, I am not so sure about that. This committee is charged with the responsibility of banking legislation, and it is one of the important banking institutions of the country. It is continually saying that it is being discriminated against. I think probably it would not be off color at all to bring them up here and find out what it

is about, and then, after that questioning, with the people that they are accusing here, if we thought it necessary to enact further legislation, we could do it. I do not think that would be a bad plan at all.

"That is all.

"Mr. Eccles. Well, I certainly would have no objection to it. Whatever the facts are in the situation, there could be no harm in bringing them out. I have felt for some little time that the Congress either should give possibly the reserve Board powers to deal with this holding company situation, particularly in the case of Transamerica, or they should take the responsibility. It may well be that the action of the Federal agencies in refusing to grant charters for additional banks or permits to establish additional branches is contrary to what Congress would feel ought to be done."

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Exhibit No. 27

Filed Apr 15 1946

EXTRACTS FROM HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY, HOUSE OF REPRESENTATIVES, 78TH CONGRESS, FIRST SESSION, ON H. R. 1699, A BILL TO AMEND SECTION 12B AND SECTION 19 OF THE FEDERAL RESERVE ACT.

From testimony of Honorable Leo T. Crowley, Chairman, Federal Deposit Insurance Corporation, on April 1, 1943.

[Page references are to official printed record of transcripts.]

[p. 37] "Mr. Wright. As you gentlemen know I am a new member of this committee and I am anxious to get a little information on the point of branch banking. Is there any control exercised over branch banking by the Federal Deposit Insurance Corporation in connection with branch banking?

"Mr. Crowley. Yes, we have three agencies for the control of branch banks extending to banks under their supervision. We have no control over stopping a holding company from extending their ownership of corporate banks. We have no way to do that.

"Mr. Patman. So indirectly you do not have sufficient force and effect to stop it?

"Mr. Crowley. Not the expansion of a holding-company system. . . ."

[p. 49] "Mr. Patman. This holding company law that Congress passed a few years ago, it did not affect the Trans-America Corporation?

"Mr. Crowley. It did not restrict them from further expansion, Congressman. There was nothing in the law that gave anyone that authority to restrict their expansion.

"Mr. Patman. Were they specifically exempt?

"Mr. Crowley. No; I mean it did not stop the growth of any bank holding company.

"Mr. Patman. You think that is a serious menace and should be dealt with by congress?

"Mr. Crowley. I do not think there is any doubt about it. . . ."

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Exhibit No. 28

Filed Apr 15 1946

EXTRACTS FROM HEARINGS BEFORE SUBCOMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 79TH CONGRESS, FIRST SESSION, ON H. R. 2357, A BILL TO AMEND SECTIONS 7 AND 11 OF THE CLAYTON ACT.

[Page references are to office printed record of transcripts.]

From testimony of Ronald Ransom, Vice-Chairman, Board of Governors, Federal Reserve System, on September 20, 1945.

[p. 336] "Mr. Ransom. I am Vice Chairman of the Board of Governors of the Federal Reserve System.

"The Board has wholeheartedly endorsed the proposal for amendment of the Clayton Act that is now before this committee. They feel that the amendments are of paramount importance and, in connection with these proposed amendments, the Board has helped to add, with the help of the Federal Trade Commission, some additional proposals that concern the field of banking, which we think is of vital importance in the whole matter.

"In order to conserve your time as much as I can, I would like to ask you to let Mr. Townsend, counsel to the Board, report very briefly the purpose behind those proposals.

"Mr. Walter. Thank you very much."

EXTRACTS FROM THE TESTIMONY WHICH MR. J. LEONARD TOWNSEND, COUNSEL, BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, THEN GAVE FOLLOW:

[p. 337] "Briefly, may it please the members of the committee, the position of the Board is this:

"Under the Clayton Act as it now stands, not only does the Federal Trade Commission assume jurisdiction over a vast domain of companies, but so do a number of other agencies, the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Authority, and the Federal Reserve Board.

"Now, since the passage of the Clayton Act all of the other agencies mentioned by me have had their individual acts or powers extended to include the fundamental philosophy of the Federal Trade Commission bill, to wit, to enable those agencies within their respective jurisdictions to see to it that in any merger, combination, purchase, and so forth, of competing organizations, the full concept of the public interest as is indicated in the Clayton Act shall be given consideration.

"And so it comes to this:

"All of the agencies except the Federal Trade Commission and the Federal Reserve Board have the authority to-

day to prevent the things that the Federal Trade Commission bill would now give to it.

"I may say to this committee that the Federal Trade Commission has been both courteous, considerate, and extremely helpful in assisting us in coordinating our point of view with that of the bill. In fact, I am indebted to Mr. Kelley, their chief counsel, for the actual draft of the provisions that you now find in your committee print, and I may say further that the Federal Trade Commission itself has received our suggestions and has seen fit, fortunately, formally to approve them.

"And so, without more, we have a direct precedent for being included in the bill. All that I need now, therefore, to do, is to say that we do want to be in it, and to show you in just a few sentences the need for our being given the same general jurisdiction. * * *"

[p. 340] "Mr. Walter. Could you in a few minutes tell us about the situation in California?

"Mr. Townsend. Well, let me put it this way, Mr. Chairman:

"After a full consideration of this matter at the Federal Reserve Board it was contemplated to say to the committee that perhaps it would be inconsistent with our position right along in this matter, unless we are positively commanded to do so by the committee, to air any particular situations."

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Affidavit of A. L. Elliott Ponsford

Filed Apr 15 1946

STATE OF CALIFORNIA,

City and County of San Francisco, ss.:

A. L. ELLIOTT PONSFORD, being duly sworn, on oath states:

I am a Director and Secretary and Assistant Treasurer of Transamerica Corporation and have held the offices of Secretary and Assistant Treasurer for more than four years last past; that Transamerica Corporation is a hold-

ing company affiliate of a number of banks which are members of the Federal Reserve System and that prior to July 31, 1937 it was a holding company affiliate of Bank of America National Trust and Savings Association; that the corporation holds a general voting permit issued April 28, 1937 to vote its stock in Bank of America National Trust and Savings Association, First National Bank in Reno, Nevada (now the First National Bank of Nevada), and The First National Bank of Portland, Oregon; that on account of its relations as such holding company affiliate of member banks it is subject to the supervisory powers vested by law in the Board of Governors of the Federal Reserve System.

My duties as a Director and officer of Transamerica Corporation are such as to require me to keep abreast of the administration of the law with respect to the rights, privileges and obligations of holding company affiliates
102 of banks, and particularly its administration by the

Board of Governors of the Federal Reserve System and in that connection to observe the official announcements of the Board of Governors of the Federal Reserve System as the same appear from time to time in the "FEDERAL RESERVE BULLETIN", the official publication of said Board. This publication is issued monthly and the information referred to herein is contained in various issues over the past several years under the topic "Current Events." This source of information discloses that since or concurrently with the admission of Peoples Bank to membership in the Federal Reserve System subject to the purported Condition No. 4, five state banks—two in Montana and three in Minnesota—have been admitted to membership in the Federal Reserve System, which banks are affiliated with the Northwest Bancorporation, a holding company affiliate. The said banks are the following:

Hill County State Bank of Havre, Montana (admitted between the period April 16, 1943 and May 15, 1943)

First State Bank of Malta, Montana (admitted between the period April 16, 1945 and May 15, 1945)

State Bank of Northfield, Minnesota (admitted between the period April 16, 1942 and May 15, 1942)

Austin State Bank, Austin, Minnesota (admitted between the period April 16, 1942 and May 15, 1942)

State Bank of Virginia, Minnesota (admitted between the period May 16, 1942 and June 15, 1942)

The said source of information also discloses that since the admission of Peoples Bank to the Reserve System there have been admitted to such System the following California banks during the periods indicated:

Napa Bank of Commerce, Napa, California (admitted between the period October 16, 1943 and November 15, 1943)

Bank of Berkeley, Berkeley, California (admitted between the period January 16, 1945 and February 15, 1945)

Bank of Beaumont, Beaumont, California (admitted between the period August 16, 1945 and September 15, 1945)

110 Security Trust & Savings Bank of San Diego, San Diego, California (admitted between the period November 16, 1945 and December 15, 1945)

The records of the Board of Governors of the Federal Reserve System with reference to the conditions of membership of state banks, according to my understanding, are regarded as confidential records between each of the banks and the Reserve System and are not available for my inspection. However, on the basis of reliable information I have reason to believe that with regard to Napa Bank of Commerce, the first bank in California admitted after the admission of Peoples Bank to the Reserve System, no such condition as Condition No. 4 was imposed or exacted of such bank. It is a matter of common knowledge that said bank has recently been absorbed by the American Trust Company of San Francisco, a state member bank, and that said Trust Company has been authorized by the Board of Gov-

ernors of the Federal Reserve System to operate a branch at the location of said bank.

A. L. ELLIOTT PONSFORD.

Subscribed and sworn to before me
this 6th day of April, 1946.

JOHN A. BURNS,

*Notary Public in and for the City
and County of San Francisco,
State of California.*

My Commission Expires April 12, 1949.

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Affidavit of Laban H. Brewer

Filed Apr 15 1946

STATE OF CALIFORNIA,

County of Los Angeles, ss.:

LABAN H. BREWER, being duly sworn, deposes and says:

I reside at 1245 East 3rd Street, Long Beach, California, and have at all times since November 23, 1943 been a Director and President of Peoples Bank, Lakewood Village, California, the plaintiff in this action. During that entire period I have been aware of the conditions prescribed by the Board of Governors of the Federal Reserve System, to which the membership of said Bank in the Reserve System purports to be subject, among which is Condition No. 4, purporting to require withdrawal from the Reserve System in certain circumstances.

The said Bank was admitted as a member of the Federal Reserve System on May 15, 1942. By virtue of such admission it has at all times been an insured bank with its deposits insured by the Federal Deposit Insurance Corporation to the extent provided by Section 12(b) of the Federal Reserve Act, as amended, and has, at all times, been required to advertise itself as an insured bank pursuant

to the laws and regulations appertaining thereto.

112 By reason of the extraordinary efforts of the Bank to provide banking service for the community in which it is located, and by reason of the rapid development of such community, the deposits in said Bank have increased to a point where it has become necessary for the Bank's Board of Directors to give consideration to the desirability and possibility of increasing the Bank's capital. In the discussions relating to this subject the fact that Condition No. 4 still exists, as originally prescribed, was regarded as a serious deterrent to the investment of additional capital funds in the stock of such Bank, and it is my opinion that there is every reason to believe that the said Condition No. 4, if continued, may well preclude increasing the Bank's capital stock.

I was present at a meeting of the Board of Directors of said Bank held on the 24th day of March, 1944, which was called for the purpose of ascertaining the full legal effect of the said Condition No. 4 upon said Bank. At such meeting, the said Board of Directors was advised, for the first time, that termination of membership in the Federal Reserve System would entail, as an inevitable and necessary legal consequence thereof, the termination of the Bank's status as an insured Bank. The Board of Directors was also then advised, for the first time, that before said Bank was admitted to membership in the Federal Reserve System, subject to Condition No. 4, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation had actually entered into an agreement which would prevent the said Peoples Bank from remaining an insured bank in the event of a termination of said Bank's membership in the Federal Reserve System through the operation of said Condition No. 4.

Upon numerous occasions I have observed the awareness of the public, and particularly the patrons of the Bank with whom I am in contact from day to day, of the fact of deposit insurance, and I know that numerous of the Bank's depositors have been, and are, at all times conscious of the

Bank's position as a member bank and as an insured bank. From time to time, as information concerning the Bank's litigation to eliminate Condition No. 4 has been published in the newspapers and discussed in the community, the Bank's membership in the Federal Reserve System has become a matter of public discussion, and to allay the concern of depositors resulting from such discussions, affiant and other directors and officers of the Peoples Bank have found it necessary to explain the character of this membership as such membership is affected by Condition No. 4, and they have consistently informed depositors that the Bank had been advised by counsel that such condition was illegal and void and could not be enforced.

In the ordinary course of the development of the Peoples Bank's business I find it to be increasingly necessary to make commitments for longer periods of time in the future affecting such matters as lines of credit, investments, personnel, banking premises, facilities and the like. The threat to the existence of Peoples Bank which is posed by Condition No. 4 and the agreement between the defendants and the Federal Deposit Insurance Corporation that the plaintiff will be permanently deprived of Federal deposit insurance in the event Condition No. 4 is formally invoked are a constant source of embarrassment and a detriment to the ability of Peoples Bank and its officers and Board of Directors to conduct it on a basis of normal development in free and equal competition with other similar institutions.

LABAN H. BREWER.

Subscribed and sworn to before me
this 4th day of April, 1946.

PAUL MILLETTE O'NEILL,

*Notary Public in and for the County
of Los Angeles, State of California.*

My Commission Expires Dec. 25, 1949.

(SEAL)

Filed Apr 15 1946

Affidavit of Michael G. Luddy

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
County of Los Angeles, ss.:

MICHAEL G. LUDDY being first duly sworn on oath states:

I am an attorney and counsellor at law, practicing my profession at 453 South Spring Street, in the City of Los Angeles; California; I have long had an interest in various banks and am now a director of Peoples Bank of Lakewood Village, Lakewood Village, California, and of Oilfields National Bank at Brea, Brea, California, and of First National Bank of Glendale, Glendale, California.

On the 21st day of December, 1943, I purchased 200 shares of the capital stock of Peoples Bank, situated in Lakewood Village, California, knowing that such bank was a comparatively new bank, a member of the Federal Reserve system, and situated in a new and thriving community. At the time of the purchase of said shares I was not aware of any extraordinary circumstances relating to said bank's membership in the Reserve System and made my investment therein believing that the said bank would have the right to avail itself of all provisions of law under which its business would grow and enable me to derive profit from my investment. Thereafter I became aware of the existence of condition number 4, to which that bank's membership in the Reserve System was subject, and I thereupon determined to take all possible measures to protect the said bank and my investment therein from the adverse effect of such provision. As a shareholder and director of said bank I know that my investment therein is impaired and that the bank is under constant and perpetual embarrassment in the development and transaction of its business by reason of the said condition. In my judgment the constructive plans of the bank to obtain additional

capital funds cannot be pursued until the said condition is judicially determined to be void and of no effect.

MICHAEL G. LUDDY.

Subscribed and sworn to before me, the undersigned G. Stuart Silliman, a Notary Public in and for the County of Los Angeles, State of California, this 2nd day of February, 1946.

G. STUART SILLIMAN.

My commission expires Aug. 9, 1947.

(SEAL)

(N.Y.)

STATE OF CALIFORNIA,

County of Los Angeles, ss.:

I, J. F. MORONEY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, which Court is a Court of Record, having a seal, do hereby certify that G. Stuart Silliman whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a Notary Public in and for Los Angeles County, duly commissioned and sworn and residing in said County, and was, as such, an officer of said State, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said State, and that full faith and credit are and ought to be given to his official acts; that the impression of his official seal is not required by law to be filed in the office of the County Clerk; I further certify that I am well acquainted with his handwriting and verily believe that the signature to the attached certificate is his

genuine signature, and further that the annexed instrument is executed and acknowledged according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 2nd day of February, 1946.

J. F. MORONEY,

*County Clerk and Clerk of the
Superior Court of the State
of California, in and for the
County of Los Angeles.*

(SEAL)

By CLAUDE JACOBY, *Deputy.*

Corp. Form No. 9

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Filed Apr 18 1946

Stipulation

WHEREAS there is now pending before this Court and set for oral argument on April 29, 1946, defendants' Motion for Judgment on the Pleadings herein; and

WHEREAS plaintiff on April 15, 1946 filed its Motion for Summary Judgment, together with affidavits in support thereof;

NOW, THEREFORE, IT IS HEREBY STIPULATED, by and between the parties hereto, subject to the approval of the Court:

(1) That plaintiff's Motion for Summary Judgment may be set down for oral argument on April 29, 1946.

(2) That in deciding defendants' Motion for Judgment on the Pleadings the Court may consider all relevant and admissible facts contained in the affidavits submitted by plaintiff in support of its Motion for Summary Judgment.

(3) That upon the hearing on these motions, counsel for defendants shall have the opening and closing arguments.

(4) That the parties may file briefs with the Court

117 within one week following the close of the oral argument.

BLAKE, VOORHEES & STEWART,
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Messrs. FULTON, WALTER & HALLEY,
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1421 Pennsylvania Avenue,
Washington, D. C.

By MARSHALL HORNBLOWER,
Counsel for Plaintiff.

EDWARD M. CURRAN,
United States Attorney, Dis-
trict of Columbia, Court
House, Washington, D. C.

GEORGE B. VEST,
J. LEONARD TOWNSEND,
Board of Governors of the
Federal Reserve System,
Washington, D. C.
Counsel for Defendants.

Approved: April 18th, 1946.

JENNINGS BAILEY,
Justice.

Opinion of Justice Bailey

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Filed Jun 3 1946

This case is before the Court on defendants' motion for judgment on the pleadings and plaintiff's motion for summary judgment, both motions having been orally argued on April 29th, last.

The complaint shows that plaintiff is a banking corporation organized under the laws of the State of California; that defendants are the individual members of the Board of Governors of the Federal Reserve System; that in 1941 plaintiff applied for membership in the Federal Reserve System; that in May 1942 it was admitted to the Federal Reserve System membership upon the following conditions, among others:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

The complaint further shows that, since plaintiff's admission to the Federal Reserve System membership, a number of its shares have been acquired by, and registered on its books in the name of Transamerica Corporation, and that these shares were acquired by Transamerica without plaintiff's knowledge or consent, and without the approval of the Board of Governors.

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Upon the basis of these facts plaintiff seeks a declaratory judgment that Condition No. 4 is invalid

and an injunction restraining defendants from taking any steps to enforce the Condition.

The defendants have filed a joint and several answer, in which they set forth two defenses. The first defense is that plaintiff, having enjoyed for almost four years the benefits of the Federal Reserve System membership, which resulted from its acceptance of Condition No. 4, is now estopped from challenging the validity of such Condition. The second defense is that the complaint otherwise fails to state facts upon which any relief can be granted.

It appears that plaintiff filed its formal application for admission to the Federal Reserve System under date of December 2, 1941; that on February 14, 1942, the Board of Governors rejected the application; that after a conference with the Board, representatives in Washington, attended by its representatives, plaintiff by letter formally requested the Board of Governors to reconsider its decision, calling attention to the fact that a number of changes had taken place in its stock ownership; that, following the receipt of plaintiff's formal request for reconsideration, the Board of Governors, under date of March 11, 1942, notified plaintiff that its application would be reconsidered if the plaintiff could demonstrate *inter alia*:

"2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.

"3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

"4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of

the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

"5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such."

Plaintiff, as a means of securing the Board of Governors reconsideration of its application, voluntarily complied with all of these requirements. Under date of April 23, 1942, plaintiff sent to the Federal Reserve Bank of San Francisco (1) a statement relative to the refinancing of its shares of plaintiff's stock, (2) a declaration signed by all of plaintiff's directors that plaintiff was "organized as a bona fide local, independent institution," and that it was not obligated in any manner to Transamerica Corporation or to any of its affiliated companies, and (3) a signed statement of each stockholder that he had no arrangements respecting the sale or transfer of his shares to Transamerica or any of its affiliated companies and that he did not intend to enter into any such arrangements in the future.

Based upon the representations thus made to it by the bank and by all of its directors and stockholders, the Board of Governors, under date of May 6, 1942, notified the plaintiff that its application had been approved subject to a number of conditions, including Condition No. 4. Before membership status could attach, however, plaintiff was required to evidence its acceptance of the conditions by formal resolution, a certified copy of which was to be filed with the Federal Reserve Bank of San Francisco.

The plaintiff contends that the Board was without power to impose this Condition No. 4 and therefore it is a nullity and should be cancelled. In my opinion, however, the plaintiff is not in a position to raise this question. It voluntarily agreed to it and on the basis of that agreement was admitted to membership in the Federal Reserve System, and for several years has received the benefits of membership in that System. It is true that there are many cases in which the Supreme Court has held that a state cannot im-

pose conditions upon the doing of business by foreign corporations which are in violation of rights secured by the Federal Constitution, and in the case of *United States v. Chicago M. St. P. & Pac. RR. Co.*, 282 U. S. 311, it held that a corporation was not estopped by a condition imposed by the Interstate Commerce Commission which was beyond the power of the Federal Government to impose. The case of *Hammer v. Dagenhart*, et al., 247 U. S. 251 had not then been overruled and was relied on by the majority of the court in holding that the Interstate Commerce Commission nor Congress itself may take any action which lies outside the realm of interstate commerce. On the other hand, in cases such as *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 U. S. 125; *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469, and *Hurley v. Commission of Fisheries*, 257 U. S. 223, it has been held that where one accepts a privilege it consents to be bound by the conditions attached to it and it will not be heard to attack its legality. And in those cases, where a foreign corporation undertakes to do intrastate business within a state, as distinguished from business arising out of interstate commerce, the tendency has been to sustain the conditions imposed by a state, *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300. So, too, in the case of *United States v. Chicago etc. R. R. Co.*, supra, at p. 342, Mr. Justice Stone dissenting said:

"Courts may determine whether the Commission lacks the power to impose a particular condition; but they may not strike from an order the condition upon which it was granted, and thus declare that it should stand although the condition is not complied with."

The condition here is clearly not one outside the domain of the Federal Government. Here the defendant Board, with discretionary power to admit or to refuse to admit the plaintiff to the privilege of membership in the Federal Reserve System, imposed a condition which was not merely acquiesced in but agreed to by the plaintiff. The claim that this agreement was brought about by duress of the

plaintiff is, I think, without foundation. The agreement was voluntarily made, it was acted on and the plaintiff received the benefits which arose from its admission to membership in the System. I see nothing contrary to public policy in the condition agreed upon by the parties; indeed, it may well be that the condition imposed was within the Board's discretion if it was of the opinion that unsound banking policies were being pursued by Transamerica and that the character of management of this plaintiff bank, if Transamerica obtained control, would be detrimental to sound banking.

In any event, plaintiff cannot now attack the validity of the condition to which it voluntarily agreed and this motion of the defendants for summary judgment will be sustained.

Mr. Justice Holtzoff has held that the Court has jurisdiction of this suit and that a case is presented for a declaratory judgment. *Peoples Bank vs. Eccles et al.*, 64 F. Supp. 811; and denied a motion to dismiss the complaint based on the ground that no justiciable controversy was presented; but the motions for summary judgment were not before him, they having been filed since his action on the motion to dismiss.

The defendant, John K. McKee, has moved to dismiss the complaint as to him, and apart from the motions for summary judgment it will be sustained. He is no longer a member of the Board; the action is not one for damages; and he no longer has any power to take any action in the premises.

JENNINGS BAILEY,
Justice.

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Filed Jun 6 1946

Order

The above-entitled matter came on to be heard by the Court upon the complaint, answer, defendants' motion for judgment on the pleadings, plaintiff's motion for summary judgment and supporting affidavits, and a stipulation of the parties filed herein and approved by the Court on April 18, 1946. For the reasons set forth in the opinion of this Court filed herein on June 3, 1946,

It Is Hereby Adjudged, Ordered and Decreed,

(1) That the complaint be and it is hereby dismissed as to the defendant, John K. McKee.

(2) That defendants' motion for judgment be and it is hereby granted.

(3) That plaintiff's motion for judgment be and it is hereby denied. —

JENNINGS BAILEY,
Justice.

Approved as to form

FULTON, WALTER & HALLEY,
Counsel for Plaintiff.

By MARSHALL HORNBLLOWER.

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Filed Jun 14 1946

Notice of Appeal

Notice is hereby given, this 14th day of June, 1946, that Peoples Bank, Plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia, from the order of this Court entered on the 6th day of June, 1946, in favor of the Defendants and against said Peoples Bank, Plaintiff:

(1) Dismissing the complaint as to the Defendant, John K. McKee;

(2) Granting Defendants' motion for judgment on the pleadings:

(3) Denying Plaintiff's motion for summary judgment.

BLAKE, VOORHEES & STEWART,
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To:

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J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.,

Attorneys for Defendants.

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

Before Honorable HENRY W. EDGERTON, BENNETT CHAMP
CLARK and WILBUR K. MILLER, Associate Justices.

No. 9338, October Term, 1946

PEOPLES BANK, APPELLANT

vs.

MARRINER E. ECCLES ET AL., APPELLEES

Minute entry

Nov. 27, 1947

Argument commenced by Mr. Samuel B. Stewart, Jr., attorney
for appellant, continued by Mr. J. Leonard Townsend, attorney
for appellees, and concluded by Mr. Samuel B. Stewart, Jr.

In United States Court of Appeals, District of Columbia

No. 9338

PEOPLES BANK, APPELLANT

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK, JOHN K.
McKEE, ERNEST G. DRAPER AND RUDOLPH M. EVANS, APPELLEES

Appeal from the District Court of the United States for the
District of Columbia

Argued November 27, 1946—Decided April 14, 1947

Mr. Samuel B. Stewart, Jr., for appellant. Mr. Joseph William
Burns also entered an appearance for appellant.

Mr. J. Leonard Townsend, Assistant General Counsel; Board
of Governors of the Federal Reserve System, with whom Mr.
Edward M. Curran, United States Attorney at the time the brief
was filed, was on the brief, for appellees.

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

Opinion

Filed April 14, 1947

WILBUR K. MILLER, J.: The principal question in this case is whether a drastically restrictive condition upon a state bank's membership in the Federal Reserve System was validly imposed by the Board of Governors of the System. A secondary question is whether the state member bank is prevented by waiver or by estoppel from challenging the validity of the condition.

The Peoples Bank of Lakewood Village, California, was incorporated in 1941 under the laws of that state, after the State Superintendent of Banks had found that public convenience and advantage would be promoted by its establishment at the proposed location. A license actually to transact business would not be granted, the Superintendent advised, until deposit insurance had been obtained through membership in the Federal Deposit Insurance Corporation or in the Federal Reserve System. Accordingly, the Peoples Bank forwarded on November 28, 1941, an application for admission to the Federal Reserve System, using the printed form furnished by the System and supplying all the data thereby required.

In acting upon the application the Board of Governors considered the financial condition of the applying bank, the general character of its management, and whether the corporate powers were consistent with the purposes of the Act, as required by Title 12, § 322, U. S. C. A. In like manner the Board of Governors considered the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and need of the community to be served by the bank, and whether its corporate powers were consistent with the purposes of the statute, as required by Title 12, § 264, subsections (e) (2) and (g). The bank, being fully qualified in those respects at the time of application, was eligible for membership in the Federal Reserve System, and the Board of Governors necessarily so found when it later permitted the institution to become a member.

But the bank was not immediately admitted. Under date of February 12, 1942, the secretary of the Board of Governors instructed the Federal Reserve Bank of San Francisco to inform the applicant that the Board "is unwilling to approve the application on the basis of the information now before it." No reason for the refusal was given, and its basis was not discovered by the Peoples Bank until late in February, 1942, when one of its directors had a personal conference in Washington with two members of the

Board and its secretary. The director's affidavit includes the following:

"During the course of my conversation with the said Board members and Secretary I recall that statements were made to the effect that Secretary Morgenthau was opposed to increasing the number of banking offices of Bank of America and that it was stated that there was considerable agitation against increasing the banking interests of bank holding companies—so much so, that there was a prospect that legislation would be introduced to curb the expansion of bank holding companies. It was also stated in substance that upon assurances that the Peoples Bank was independent of Bank of America and Transamerica Corporation the Board might be disposed to reconsider the application."

The bank asked the Board to reconsider, and furnished information concerning changes in the ownership of its shares which had occurred after the filing of its original application. By letter dated March 11, 1942, the Federal Reserve Bank of San Francisco informed the Peoples Bank "that the Board of Governors will be glad to reconsider your application upon a definite showing by the directors of your bank" that five conditions set out in the letter had been met. These conditions are shown in the margin.¹

The bank complied with those requirements. In meeting the third requirement contained in the letter of March 11, 1942, each shareholder of the bank signed the following letter:

"I, the undersigned, being a stockholder of the Peoples Bank, Lakewood Village, California, do hereby state that I have no arrangements, expressed or implied, with respect to the sale or transfer of the stock of the Bank which I own to either the Transamerica Corporation, or any organization affiliated or closely identified with Transamerica Corporation, or any other Bank Holding Company group, and that I do not intend to enter into any such agreements or understandings."

Some weeks thereafter, on May 6, 1942, the Board approved the application for membership, subject to three conditions which it

¹ 1. That arrangements have been made by Mr. John S. Griffith, San Marino, California, for financing the purchase of his stock in a manner different from that in effect at the time of our investigation of your bank's application for membership; and that such arrangements are consistent with the other provisions of this letter.

"2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.

"3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

"4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

"5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such."

clearly had the statutory right to impose, and subject to a fourth condition which, sharply challenged, is the storm center of this litigation. The first three conditions, standard in character and usually imposed on State banks applying for membership, are shown in the margin.² Condition No. 4, which the appellant says not only is not standard, having never been imposed before or since, but invalid as well, is as follows:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

Since the conditions in the commitment of May 6, 1942, were substantially those contained in the San Francisco Reserve Bank's letter of March 11, 1942, already met, no additional action by the appellant bank was necessary specifically to meet the formal conditions in the communication of May 6, 1942. Having been in other respects ready for many months to function as a banking institution, the Peoples Bank opened its doors and began business activity soon after it became a member of the System pursuant to the commitment.

In 1944, the proscribed Transamerica Corporation, without the knowledge or assistance of the bank, acquired 540 shares of its capital stock, being slightly more than 10 percent of the total of the 5,000 shares authorized, issued and outstanding. The bank immediately reported that fact to the Board and asked to be relieved of Condition No. 4 which, in view of Transamerica's acquisition of stock, made it possible for the Board immediately to demand that the bank withdraw from the System. As withdrawal

¹"1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its deposits, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

"2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

"3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise), notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation."

would result in automatic cancellation of deposit insurance, the bank regarded the literal enforcement of Condition No. 4 as a death sentence.

When the Board refused to revoke the provision, the Peoples Bank sued its members in the District Court of the United States for the District of Columbia to have the condition adjudged invalid, and to enjoin its enforcement.

The Board members moved to dismiss the complaint on the ground that it presented no justiciable controversy. After that motion had been denied,³ an answer was filed pleading that the complaint showed on its face (a) that the bank was estopped to deny the validity of Condition No. 4, (b) that in imposing Condition No. 4 the Board exercised the administrative discretion conferred to it by § 9 of the Federal Reserve Act,⁴ and (c) the validity of Condition No. 4. With this answer in the record, the Board members moved for judgment on the pleadings. The bank countered with a motion for summary judgment and filed in support numerous affidavits and exhibits in which the factual background of the controversy is shown.

Upon consideration of the several motions, the District Court's opinion was that the bank "cannot now attack the validity of the condition to which it voluntarily agreed." Being of that view, the court entered judgment for the Board members, on the pleadings, and denied the bank's motion for summary judgment. The Peoples Bank appeals.

We first consider the question whether the Board of Governors had the power to attach Condition No. 4 to the membership of the Peoples Bank in the Federal Reserve System.

Under the literal language of the condition, the Board's right to expel the bank becomes absolute the moment Transamerica acquires a stock interest, without a previous finding that Transamerica's acquisition of shares would, or probably would, adversely affect the bank. Nor is the effectiveness of the Board's power to expel under Condition No. 4 made to depend upon the acquisition by Transamerica of a controlling interest in the bank. The ownership by that corporation of any number of shares, however small, sets the condition in motion and gives rise to the power of expulsion.

This striking denunciation of Transamerica makes pertinent an inquiry into the nature of that organization. The record discloses it to be a large corporation, owning extensive interests in many banks and in other corporations as well. It is a substantial stockholder in the Bank of America, which for several years has

³ *Peoples Bank v. Eccles*, 64 F. Supp. 811.

⁴ 12 U. S. C. A., § 321.

been one of the two or three largest banks in the Nation. The financial soundness of Transamerica is not challenged. The character, integrity and ability of its management are not assailed. No statute, state or federal, forbids it to own shares of the Peoples Bank or any other bank.

The basis for the imposition of this unusual and unqualified prohibition against Transamerica's acquiring shares of the bank in question is shown by the record to be the fact that for some time federal bank regulatory authorities, including the Board, have regarded further expansion of Transamerica as undesirable and unsound. Moreover, we are so advised by the following statement in the appellees' brief:

"In this case the record shows that the Board had reason to believe that appellant, at the time it applied for membership in the System, was under or was about to come under the management of Transamerica Corporation, the bank expansion program of which the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation all believed to be unsound. Condition No. 4 was therefore designed to prevent that corporation from taking over appellant's affairs after it came into the System."

The fact is, however, that the record does not show that the Board had reason to believe that appellant, at the time its application was filed, was under or was about to come under the management of Transamerica. The purpose of Condition No. 4, therefore, was primarily to check the growth of Transamerica, which the Board considered to be already too large.

Whether the Board of Governors has the power, in the effort to implement its theory that the enlargement of bank holding companies should be forbidden, to deny to Transamerica its right, otherwise entirely legal, to purchase and own shares in the Peoples Bank, depends on whether the Federal Reserve Act expressly or impliedly confers such authority. In other words, the validity of Condition No. 4 as a curb to the growth of a bank holding company depends upon whether the Congress intended to authorize the Board to arrest the extension of such companies.

If such a legislative intent does not appear, grave doubt arises as to the right of the Board to form such an intent for itself. Furthermore, if a contrary intent on the part of Congress be found, unquestionably the Board's assumption of the power to check the expansion of bank holding companies amounts to an invasion of the legislative field. All the Board's power springs from the statute. An administrative agency may have a wide latitude within which to function, and may be authorized to prescribe regulations which must be observed by those subject to its jurisdiction. But

its regulations must fall within the limits of the authorizing statute, and must be such as will carry into effect the will of Congress.⁸ The broad discretion confided to the Board of Governors continues only so long as it acts within its statutory scope. When the Board reaches the border of the Federal Reserve Act it must stop, for to go beyond would be to impinge on Congressional prerogatives.

We turn to the Federal Reserve Act to see whether it manifests an intent on the part of Congress to forbid bank holding companies to expand, either by prohibiting them from owning minority stock interests in state member banks, or by the use of any other device. We find no such prohibition. The Act goes no further, with respect to limiting the activity of a holding company, than to provide that one which owns a majority of the shares of a member bank may not vote such shares without first obtaining a permit from the Board of Governors. The Congress has thus expressly conferred upon the Board the right to supervise and curb a holding company when, through the ownership of a controlling interest, it is in a position to dominate a bank's management and to dictate its policy. It was not deemed necessary to give the Board the right to prevent or restrict voting by a holding company having less than a majority interest, as no such provision appears in the statute. Obviously the legislators did not share the Board's apprehension that harm might come to a member bank from the votes of a holding company having less than control.

This limited statutory restriction upon bank holding companies, which contrasts strikingly with the broad restraint imposed by the Board in the present case, has added significance when considered in the light of certain legislative history of the Federal Reserve Act. From that history it is learned that the Congress, quite deliberately and because of what it considered an abuse of a power which it had theretofore granted to the Board in broad general terms, provided that the Board of Governors may only impose such conditions upon a bank's admission to the System as are within and pursuant to the legislative intent in adopting the Act.

⁸ *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129, 134, where the Supreme Court said:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 320-322; *Miller v. United States*, 294 U. S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co. v. Davidson*, 257 U. S. 506, 514."

Prior to 1927, the governing body of the Federal Reserve System had the very broadest power to attach conditions to a bank's entry into the System. The statutory language* on the subject was:

"The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the applying bank to become a stockholder."

At a hearing before a subcommittee of the Senate Committee on Banking and Currency in February 1926, Senator Carter Glass stated that the Federal Reserve Board (predecessors of appellees here) "has usurped the legislative functions of Congress." An amendment to restrict the power of the Board to impose conditions upon membership was being considered. Senator George Wharton Pepper, of Pennsylvania, who favored such an amendment, said in the Senate on February 23, 1925:

"* * * the committee thinks that the discretion of the Federal Reserve Board in the premises should be a discretion exercised pursuant to the provisions and conditions of the act; that is, that there was no intent of Congress, when the Federal Reserve Act was passed, to create in the Federal Reserve Board a body to prescribe any kind of conditions it pleased as conditions precedent to admissibility to the Federal Reserve System, but rather to confer upon the Federal Reserve Board authority to make regulations pursuant to the Act fixing the terms upon which banks might become members of the Federal Reserve System."

The Board of Governors desired to retain the right to impose any conditions it chose upon membership and expressed its unqualified disapproval of the amendment proposed. Nevertheless, in 1927 the Congress amended the provision to read as follows:

"The Board of Governors of the Federal Reserve System, subject to the provisions of this title and to such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a stockholder of such Federal Reserve Bank."

Moreover, the Board of Governors has expressly recognized that it has no statutory power to prevent the expansion of bank holding companies. An example of this recognition is found in the testimony of the appellee, Marriner S. Eccles, chairman of the Board of Governors, before the Committee on Banking and Currency of the House of Representatives on April 5, 1943. He said that he had given considerable thought to the operation and development of Transamerica and that he did not look upon it as a wholesome undertaking. He stated his opinion to be that Transamerica,

* 40 Stat. 233, Public Law 25, 65th Congress, approved June 21, 1917.

† 44 Stat. 1229, 12 U. S. C. A. 321.

in its purchase of the stock of banks and of the stock of corporations having nothing to do with banks, was pursuing an improper and unsound policy. He added, however, that the Board did not have, and had never sought from Congress, any power or authority to deal with that situation.

In his appearance before the same committee on May 10, 1943, Eccles was asked by Congressman Patman: "* * * unless you can get better cooperation out of Transamerica you would look with favor upon advocating legislation that would curb the bank holding companies?" He replied, "That would give the Board the power to require what they would consider a policy in the public interest." That answer constituted an admission of the Board's lack of power to curb holding companies, although its members considered that such curbing would be in the public interest.

Further recognition by the Board of its lack of the authority which it attempted to exercise by the imposition of Condition No. 4 appears in its annual report for the year 1943. After saying "there is now no effective control over the expansion of bank holding companies or in any other field in which they may choose to expand," the Board of Governors recommended to Congress "that immediate legislation be enacted preventing further expansion of existing bank holding companies or the creation of new bank holding companies." That recommendation has not been followed and no such legislation has been enacted by the Congress.

So there is no statutory bar to the expansion of bank holding companies such as Transamerica. No Congressional enactment forbids Transamerica or any similar corporation to acquire and own any number of shares of the Peoples Bank or any member or non-member bank. Although the Board has requested Congress to authorize it to prevent the further growth of Transamerica and like organizations, Congress has withheld that authority. Its failure to enact the restrictive legislation strongly recommended by the Board of Governors shows a legislative intent that acquisition of bank shares by holding companies shall not be unlawful.

But nevertheless Condition No. 4 imposed by the Board of Governors in this case singles out one holding company and prohibits it from owning any shares of the member bank, however few in number. As has been shown, the avowed purpose was to prevent further expansion of Transamerica, in the face of the fact that the Board has expressly recognized its lack of power in that respect and has unsuccessfully sought to obtain such power from the Congress. Inevitably, it follows that if the Board's sole purpose here was to prevent the enlargement of Transamerica, the

condition imposed was not expressive of, but contrary to, a plainly evident legislative intent. If that were its sole purpose, Condition No. 4 is invalid.

We find, however, that the Board members take the position that their purpose in imposing the condition was not only to check the extension of Transamerica, but also to protect the bank by preventing Transamerica from taking over its affairs. The appellees state in their brief, as we have heretofore shown, that "Condition No. 4 was therefore designed to prevent that corporation (Transamerica) from taking over appellant's affairs after it came into the System." The appellees' brief then adds, "Thus the Condition is directly related to 'management' and 'financial condition,' two of the subjects which the Board is specifically required to consider in passing upon membership applications. Under such circumstances the Condition has even that direct statutory sanction which appellant's argument would require." In this connection, it is noted from the record that on January 28, 1946, the Board of Governors adopted the following resolution:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation."

The quoted resolution, in our view, administratively interprets Condition No. 4 as meaning that, if the Board should decide that a substantial change, against the public interest, has occurred in the bank's management, control or policy because of Transamerica's stock ownership, it must withdraw from the System after notice to do so. For obvious reasons, the Board could properly reach such a decision only after a full and fair hearing.

It is, of course, apparent that the resolution of January 28, 1946, adopted nearly two years after Transamerica acquired its shares and after the bank had during the same period unsuccessfully sought relief from the harsh condition, was primarily intended as an aid to the appellees' motion to dismiss the complaint. It was adopted soon after the suit was filed and was attached to the motion to dismiss. As indicative of the absence of a justiciable controversy, the resolution was not convincing to Mr. Justice Holtzoff, of the District Court, whose opinion* points out that the sword

* Peoples Bank v. Eccles, 64 F. Supp. 811.

of Damocles is still suspended over the bank with the Board claiming the right at any time to cut the thread. Indeed, the appellees state in their brief that action under the condition is "now justified by the facts."

In regarding the resolution as an administrative interpretation of the condition, we are supported by the appellees who state in their brief:

"Condition No. 4, however, is not self-executing, as appears on its face. And the Board, in affixing the Condition in the light of the opinion which it then entertained as to the potential danger of Transamerica affiliation, did not by so acting declare in advance what its administrative decision might be if and when Transamerica should acquire some of appellant's shares. In affixing the Condition—by agreement with appellant—the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto. Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced."

With the controversial Condition No. 4 thus properly evaluated by the Board itself, it is at once seen that the condition means no more, and gives the Board no greater authority, than standard Condition No. 1, which is that "subject bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, * * *." That is to say, if at any time a member bank shall appear to the Board of Governors to be pursuing unsound or unsafe bank policies, the Board may require it, after hearing, to withdraw from the System. Title 12, U. S. C. A., § 327, expressly provides that if a member bank has failed to comply with the provisions of certain sections of the Federal Reserve Act, or the regulations of the Board of Governors made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed, the Board shall have power, after hearing, to require the bank to surrender its stock in the Federal Reserve Bank and to forfeit all rights and privileges of membership.

If Condition No. 4 were given a literal interpretation, instead of the rational construction placed on it by the resolution of January 28, 1946, it would clothe the Board with arbitrary power to expel the bank without a hearing upon the happening of a contingency which had not adversely affected in any manner either the bank's position or the safety of its depositors. So construed, the condition is not authorized by the Act.

With respect to the meaning of Condition No. 4 and the method by which the Board could invoke it, the appellees, having made the

concession heretofore quoted from their brief, make yet another which seems to us to be of extreme importance:

"Even should appellant, if and when it receives such notice, take no action pursuant thereto, its membership could not be summarily forfeited. Section 9 of the Act (46 Stat. 250, 251, c. 207, U. S. C., Title 12, § 327) provides that, while the Board may order such a forfeiture, it can only do so 'after hearing' and a finding that appellant 'has failed to comply with the provisions of * * * [the law] or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto. * * *'. Appellant's alleged danger is thus rendered even more remote."

Nothing in the condition itself requires the restrained interpretation of it contained in the appellees' language just quoted. The condition does not in so many words compel the construction placed upon it by the resolution of January 28, 1946, nor does it afford a hearing to the bank which the appellees now admit should be accorded. The appellant's alleged danger, which the appellees say "is thus rendered even more remote," was not remote as long as the unqualified denunciation of Transamerica was insisted upon by the appellees, and was regarded by them as a part of the bank's contractual obligations.

We have heretofore stated our conclusion to be that Condition No. 4, as a mere device to check the growth of a holding company, finds no foundation in the statute. We hold that it has validity only as a statement that, if the Board of Governors should determine, after hearing, that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way, it may require the bank to withdraw from the Federal Reserve System. Only in that sense can the condition be regarded as having been imposed pursuant to the Act. It is assumed that the Board would not resort to the drastic penalty of expulsion until it had exhausted the other disciplinary and corrective processes prescribed by the Federal Reserve Act.⁹

We turn now to the argument of the appellees that by accepting and enjoying membership with Condition No. 4 attached, the bank is estopped to question its validity or has waived invalidity or the right to assert it. Appellees' position is not sustained by the Supreme Court cases cited by them.¹⁰ Those cases dealt with situations in which litigants were attacking the constitutionality of statutes or orders under which they had accepted privileges.

⁹ Title 12, U. S. C. A. §§ 264 (1) (1) (2), 301 and 77.

¹⁰ *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 U. S. 125; *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300; *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469; *Hurley v. Commission of Fisheries*, 257 U. S. 223.

② Their remaining authority, *White Star Bus Line v. People of Puerto Rico*, 75 F. (2d) 889, was a case in which the bus company had accepted and operated under a franchise containing a proviso for annual payment of royalties to the island government. Later the bus line questioned the authority of the Public Service Commission to condition the franchise upon the payment of royalties. The Circuit Court of Appeals did not go so far as to hold that estoppel had arisen, but was content to say "It is doubtful whether the bus line is now in a position to raise this issue."

As justifying its doubt, the court cited *United Fuel Gas Company v. Railroad Commission*, 278 U. S. 300 (also cited to us by the appellees); and *Wall v. Parrott Silver and Copper Company*, 244 U. S. 407. In our view neither decision furnishes a basis for the doubt which the Circuit Court of Appeals expressed. In the *Railroad Commission* case, the Supreme Court's holding on the point we now discuss was that those "who have procured action by a state commission under a state statute may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state constitution." In the *Parrott* case the Supreme Court said that "The appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to those statutes, which is still pending, waived their right to assail the validity of them."

Obviously the principle announced in these two cases, which is the same rule found in the other Supreme Court decisions cited by the appellees, does not apply where the litigant charges that the administrative body has exceeded the authority conferred upon it by a statute, but does not attack the validity of the statute.

Whether estoppel has arisen, whether waiver has occurred, depends entirely upon whether Condition No. 4 is valid or invalid. No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it.

The remaining question is whether a justiciable controversy was shown. The appellees maintain that there was none, saying that an indispensable element of justiciability is a showing of either positive action or a threat to take such action by the responsible officials involved. We need not elaborate upon the opinion of the learned justice of the District Court¹¹ which rejected that contention in denying the appellees' motion to dismiss the complaint.

¹¹ Justice Alexander Holtzoff in *Peoples Bank v. Eccles*, 64 F. Supp. 811.

The resolution of January 28, 1946, disclaiming an immediate purpose to enforce Condition No. 4, protected the bank from literal enforcement of the condition only on that day; for the appellees argue in this court that enforcement is "now justified by the facts," although the resolution has not been rescinded, and a different one has not been adopted.

To those acquainted with the realities of banking, it is plain that public knowledge in the bank's service area of the existence of Condition No. 4 does incalculable harm to the bank. It is generally realized that nothing could more quickly cause depositors to lose confidence in a banking institution than withdrawal of federal deposit insurance. It is equally true that the confidence of depositors is undermined and weakened when they know that their insurance may be withdrawn on short notice, without a hearing, and for a cause having no relation whatever to the safety of their deposits. In such circumstances a positive threat by the Board to enforce the condition is not necessary to do the harm. The threat is implicit in the condition itself, and the harm is present and continuing, due to the mere existence of the condition.

But with the amelioration of the ill-chosen language of Condition No. 4, which the appellees now concede to be proper and which they claim is expressive of their original intention in adopting it, the mere presence of the condition will not continue to be harmful to the bank. With the provision construed to have the meaning which we have said is the only significance properly attributable to it, the bank's public will know that it is subject to expulsion from the System only for reasons which would justify expulsion of any member bank.

We hold, therefore, that a justiciable controversy was shown by the pleadings; that the District Court erred in reaching the conclusion that the bank "cannot now attack the validity of the condition to which it voluntarily agreed." As the District Court should have proceeded to interpret Condition No. 4, its decree will be set aside and the cause remanded for the entry of a judgment construing that proviso in a manner consistent with its true meaning as conceded by the appellees and as stated in this opinion. When that is done, there will be no ground for restraining the appellees from enforcing the condition, nor will the bank have any need for such injunctive relief.

Reversed and remanded.

Dissenting opinion

EDGERTON, J., dissenting: I think the Board had authority to impose the condition of which appellant now complains. However that may be, I think it clear that since the Board has not taken

or threatened any action to enforce this condition there is no controversy over which the courts have jurisdiction. I do not reach the question of estoppel.

In United States Court of Appeals for the District of Columbia

No. 9338—April Term, 1947

PEOPLES BANK, APPELLANT

vs.

MARRINER S. ECCLES ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

Judgment

Filed April 14, 1947

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

Per Mr. Justice WILBUR K. MILLER.

Dated April 14, 1947.

In the United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Designation of record

Filed May 14, 1947

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for

writ of certiorari in the above-entitled cause and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

George M. Fay,
GEORGE M. FAY,

*United States Attorney for the District of Columbia,
Court House, Washington, D. C.*

George B. Vest,
GEORGE B. VEST,
J. Leonard Townsend,
J. LEONARD TOWNSEND,

*Board of Governors of the Federal Reserve System,
Washington, D. C.,
Counsel for Appellees.*

Personal service of the within designation acknowledged this
13 day of May 1947.

Marshall Hornblower,
MARSHALL HORNBLOWER,

FULTON, WALTER & HALLEY,
*1411 Pennsylvania Avenue NW., Washington, D. C.,
Counsel for Appellant.*

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

(Filed October 13, 1947)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYM-
CZAK, JOHN K. MCKEE, ERNEST G. DRAPER AND
RUDOLPH M. EVANS, *Petitioners*

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYM-
CZAK, JOHN K. MCKEE, ERNEST G. DRAPER AND
RUDOLPH M. EVANS, *Petitioners*

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

The Solicitor General, on behalf of Marriner S. Eccles, Chairman of the Board of Governors of the Federal Reserve System, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, members of said Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on April 14, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia holding that the controversy is justiciable (R. 11-23) is reported in 64 F. Supp. 811. The memorandum opinion of that court dismissing the complaint (R. 113-117) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 121-132) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 14, 1947 (R. 133). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Whether the Board exceeded its statutory authority in imposing a condition of membership "pursuant" to Section 9 of the Federal Reserve Act.

(2) Whether respondent under the circumstances of this case is not estopped from challenging the validity of the Condition.

(3) Whether the District Court had jurisdiction to entertain a declaratory judgment action attacking the validity of the Condition, the Board having neither acted nor threatened to act under the Condition, and whether the case is premature in view of respondent's failure to exhaust its administrative remedy.

STATUTE INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 20-22.

STATEMENT.

In 1941 respondent, Peoples Bank of Lakewood Village, California (hereinafter sometimes referred to as the Bank), applied to the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) for admission to the Federal Reserve System (hereinafter referred to as the System) (R. 40-41). Its application was at first denied by the Board (R. 50) but, subsequently, after being reconsidered in the light of certain assurances by the Bank and all of its stockholders concerning the independent status of the institution (R. 52-58), it was approved by the Board. In May 1942 the Bank was admitted to System membership subject to the following condition, among others:

4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System. (R. 59)

In February 1944 Transamerica Corporation, without prior approval of the Board and without the knowledge of the Bank, acquired a number of the Bank's shares, which were registered in its name on the Bank's records (R. 6). Respondent reported this

fact to the Board (R. 7), and in December 1945 demanded that Condition No. 4 be cancelled. This demand was not "complied with" (R. 7). Thereafter this proceeding was commenced by the Bank to have Condition No. 4 declared invalid and to enjoin the Board from enforcing the same (R. 1-9).

Petitioners moved to dismiss the complaint in the District Court on the ground that, as they had not threatened to enforce the Condition, no justiciable controversy was presented by the pleadings (R. 10). In support of this motion petitioners submitted, in affidavit form, an excerpt from the minutes of the Board of January 28, 1946, as follows:

Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation. (R. 10-11)

Petitioner's motion to dismiss was denied (R. 10-23).

Thereafter petitioners filed their joint and several answer in which they set forth two defenses. The first was that the Bank, having enjoyed for almost four years the benefits of System membership which resulted from its voluntary acceptance of Condition No. 4, was estopped from challenging the validity of the Condition. The second defense was that the complaint failed to state facts upon which any relief could be granted (R. 23-24).

On this state of the record petitioners moved for judgment on the pleadings (R. 25). The Bank countered with a motion for summary judgment, filing a number of affidavits in support of its motion (R. 25-111). It was stipulated that any relevant and admissible facts contained in these affidavits might be considered by the District Court in deciding both motions (R. 111-112). On June 3, 1946, that court granted petitioners' motion for judgment on the pleadings, holding that the Bank was legally estopped from challenging the Condition (R. 113-117). At the same time the court denied respondent's motion for summary judgment (R. 118). Judgment dismissing the complaint was entered on June 6, 1946 (R. 118). On appeal the court below reversed, Mr. Justice Edgerton dissenting (R. 121-132).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that Condition No. 4 as literally construed is invalid because of an alleged unlawful "purpose" of the Board in imposing the Condition.

(2) In holding that the Board and its counsel made certain alleged "concessions" having the effect of modifying the literal terms of the Condition in the manner stated in the majority opinion.

(3) In limiting the statutory right of the Board to invoke the Condition by requiring the finding of facts not suggested by the Condition itself.

(4) In holding that the action presents a justiciable controversy within the meaning of the Declaratory Judgment Act.

(5) In failing to hold that the case was premature because of respondent's failure to exhaust its administrative remedy.

(6) In holding that respondent is not legally estopped from challenging the validity of Condition No. 4.

(7) In overruling the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

This case presents for the first time in the courts an important question concerning the statutory authority of the Board to condition the admission of banks to System membership. The majority opinion below unduly expands the jurisdiction of the courts to supervise the administration of a comprehensive Congressional scheme of bank regulation, even to the point of substituting the court's views for that of the Board in a matter patently involving the application of an informed judgment and discretion. There are also presented two additional questions of considerable importance—whether the case at bar presents a justiciable controversy under the federal declaratory judgment statute, and whether respondent, by agreeing to Condition No. 4 and accepting the benefits of System membership resulting therefrom, is not estopped from now asserting the alleged invalidity of the Condition.

(1) Because of the nature of the majority opinion below, the first issue, which relates to the authority of the Board to impose conditions of membership, is divided into two parts. The first relates to that portion of the court's opinion which holds that the Condition, as "literally" construed, is invalid. The second relates to a subsequent portion of the majority opinion in

which the court in effect rewrote the Condition in the light of certain "concessions" alleged to have been made by the Board and its counsel since the initiation of these proceedings.

(a) Under Section 9 of the Federal Reserve Act (hereinafter referred to as the Act), the Board is granted specific authority to impose membership conditions "pursuant" to that Act.

When it receives the application of a non-insured State bank (the situation in the case at bar), the Board is required by the statute to consider two sets of critical data respecting the applicant. The first, which relates to the bank's eligibility for admission to the System, includes "the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes" of the Federal Reserve Act. Sec. 9(3), 12 U. S. C. 322. The second, which relates to the bank's eligibility for federal deposit insurance coverage,¹ includes the "financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes" of the insurance section of the Act. Section 12B(g), 12 U. S. C. 264g.

Condition No. 4 relates to the "character of * * * management", one of the subjects which the Board was

¹ Under the Act deposit insurance coverage may be obtained by a bank in one of two ways. It may apply directly to the Federal Deposit Insurance Corporation, in which event the Board takes no part in the consideration of the bank's application. Or, as here, a non-insured bank may apply for membership in the System, in which event its admission automatically entitles it to federal insurance coverage.

required by both statutes to consider in passing upon respondent's application. The application for membership had been approved by the Board because of the Bank's character as a "bona fide local independent institution" (R. 60). It is elementary that the responsibility for supplying the "management" of a corporation is placed by law upon its stockholders. The Board could properly have concluded that to permit Transamerica to obtain an interest in respondent would affect the character of respondent's management.² If the Board believed the Transamerica management policy to be harmful to the sound banking system which the Federal Reserve Act was designed to establish (see R. 84), and had some basis for thinking that Transamerica had designs on respondent, there was good reason for its requirement that respondent be allowed to enter the system only on condition that it retain its independence of Transamerica.

Next, the record shows that, at or about the time the Board acted upon respondent's application, there was unanimity of opinion between the three federal bank supervisory agencies, the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Transamerica bank expansion policy was unsound (R. 69-70, 84). Indeed, the latter had "indicated its unwillingness . . . to insure any newly organized State nonmember bank in which Transamerica

² It is recognized that ownership of a majority of the voting shares of one corporation by another is not necessary in order to obtain practical working control of such company. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships." *North American Co. v. Securities and Exchange Commission*, 327 U. S. 686, 693.

Corporation ha[d] a substantial interest." (R. 84) From the standpoint of deposit insurance there are obvious reasons for not permitting too large a portion of the insurance to cover a single organization. Such a determination by the Insurance Corporation clearly was entitled to the highest respect by the Board, particularly in view of the fact that, by being admitted to System membership, respondent automatically became entitled to deposit insurance coverage. This situation supplies another "purpose" directly traceable to the statute itself.

Finally, as the majority opinion points out, the record shows that Transamerica is "a large corporation, owning extensive interests in many banks and in other corporations as well." (R. 124.) The court below was referred to a table appearing in the Congressional Record (Vol. 90, p. A3018) in which it appeared that as of December 31, 1943, the banks and branches in the Transamerica group comprised almost 40 per cent of all the banks and branches in the area covered by the States of Arizona, California, Nevada, Oregon and Washington, with an even higher ratio in the State of California. In the light of this situation the Board clearly had the right to conclude that sound banking required the development of the independent banking structure of that area. The Board is authorized (Section 9(1), 12 U. S. C. 321) to prescribe conditions of membership "pursuant" to the provisions of the Act. Since the Act was plainly intended to establish a sound banking system for member banks, conditions designed to accomplish that statutory objective were clearly authorized. As a dispenser of federal privileges in the banking field, the Board also could properly take into account the national policy against restraints of com-

merce and monopoly as contained in federal antitrust laws and could therefore validly condition the grant of such privileges in the light of the objectives sought by those statutes. Cf. *National Broadcasting Co. v. United States*, 319 U. S. 190, 222-224. These considerations, which supply still other valid purposes for the Board's action in imposing the Condition, are emphasized by the fact that, under Section 11 of the Clayton Act (15 U. S. C. 21), the Board is granted specific authority to enforce certain sections of that Act, including the prohibitions in Section 7 (15 U. S. C. 18) against acquisitions of stock between competing companies engaged in commerce, where the effect of such acquisitions results in substantially lessened competition between those companies, restrains trade or commerce, or tends to create a monopoly.

The majority below invalidated Condition No. 4 as drawn because of an alleged "purpose" which the court found to have motivated the Board in imposing the Condition. That "purpose", as found by the court, was "to check the growth of Transamerica Corporation" through the device of the Condition—a purpose the court found beyond the Board's power to entertain and which allegedly rendered the Condition not one "pursuant" to the Act. But the considerations set forth above show that the Condition was legitimately related to functions which the Board could properly have taken into account in determining whether to approve respondent's application.

If we assume the motive of the Board to be relevant, the court below was not justified in concluding that the purpose related to the growth of Transamerica rather than to the factors relating to respondent which the Board could properly have considered. Nothing in the record proves the former to have been the Board's pur-

pose.³ The record does disclose that the Board regarded the Transamerica "financial policies" as not "consistent with the public interest", and that the Board was opposed to the further expansion of Transamerica (R. 84). But the fact that the Board deemed the further expansion of Transamerica contrary to the public interest would not mean that restrictions upon respondent so as to preserve its independence of Transamerica were not conditions related to the character of respondent's management, a matter which the Board was specifically required to consider.

Since the Condition was not invalid on its face, and since it could have resulted from entirely lawful motives, it was improper for the court below to assume that the Board's purposes was de hors the statute. "Official acts of public officers" are supported by a "presumption of regularity", not the contrary. *United States v. Chemical Foundation*, 272 U. S. 1, 14.

(b) Having invalidated the Condition according to its literal terms, the opinion below then goes on to point out a number of "concessions" alleged to have been made by the Board and its counsel respecting the Condition. These "concessions" had the effect, according to the court, of modifying the literal terms of the Condition. The court concluded that, as so modified, the Condition is valid, but that before the Board can take any action pursuant thereto it must first find, after

³ The complaint alleged no facts concerning the existence of such a "purpose". The Board's answer was limited solely to legal defenses, the Board electing to stand upon the Condition as drawn by filing a motion for judgment on the pleadings contemporaneously with the filing of its answer. The only facts which were before the lower court were those contained in certain affidavits submitted in conjunction with respondent's motion for summary judgment. None of those, however, disclose the Board's "purpose" in imposing the Condition. Finally, the opinion itself contains no factual reference to support the conclusion as to "purpose".

hearing; that the safety of the Bank's depositors has been jeopardized by the Transamerica acquisition of the Bank's shares. The effect of this ruling is to emasculate the Condition. Indeed, the opinion specifically states that, as modified, the Condition "means no more, and gives the Board no greater authority, than standard Condition No. 1, which is that 'subject bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, . . .'" (R. 129). Such a result denies to the Board the authority to impose conditions of membership within the full reach of its delegated power, and, in the case at bar, imposes additional procedural requirements to those prescribed by the statute.

Nothing in the record of this case would seem to justify the action of the majority below in thus stripping the Condition of its vitality. Aside from the fact that the sources of the so-called "concessions" are separated in the opinion from the contexts in which they were submitted in the lower courts, the literal texts of those statements do not support the conclusion reached by the majority. The resolution of the Board referred to in the opinion⁴ was submitted as part of the motion to dismiss for lack of a justiciable controversy (R. 10-11). It was intended to show that the Board had not acted upon, nor threatened to act upon, the Condition at the time the suit was brought. The two extracts from the Board's brief likewise were directed to showing the lack of a justiciable controversy. One⁵

⁴ Supra, p. 4.

⁵ "Condition No. 4, however, is not self-executing, as appears on its face. And the Board, in affixing the Condition in the light of the opinion which it then entertained as to the potential danger of Transamerica affiliation, did not by so acting declare in advance what its administrative decision might be if and when Trans-

urged that the Condition on its face was not self-executing; and that the 60-day notice provided for in the Condition negated the idea of any imminent threat to respondent's status as a member bank. The other⁶ pointed out that, even if the 60 day notice were sent and respondent refused voluntarily to withdraw, as agreed, then under Section 9(8) (12 U. S. C. § 327) of the Act a hearing before the Board would be required before respondent could be expelled for breach of the Condition; and this rendered even more remote respondent's alleged cause of action. Nothing in the literal language of those statements is inconsistent with or negatives the right of the Board to take action under the Condition whenever it might appear appropriate to do so to effectuate any of the legitimate objectives of the Condition discussed hereinabove. Nor is the Condition inconsistent with the statutory right to a hearing.

The conclusion drawn by the lower court from these statements, that Condition No. 4 means, "no more, and gives the Board no greater authority, than standard Condition No. 1" (R. 129), is thus plainly a *non sequitur*.

Furthermore, in holding that, before the Board might validly invoke the Condition, it must first find,

america should acquire some of appellant's shares. In affixing the Condition—by agreement with appellant—the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto: Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced." (R. 129.)

⁶ "Even should appellant, if and when it receives such notice, take no action pursuant thereto, its membership could not be summarily forfeited. Section 9 of the Act (46 Stat. 250, 251, c. 207, U. S. C., Title 12, § 327) provides that, while the Board may order such a forfeiture, it can only do so 'after hearing' and a finding that appellant 'has failed to comply with the provisions of . . . [the law] or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto . . .'. Appellant's alleged danger is thus rendered even more remote." (R. 130.)

after hearing, that there has been "a change for the worse" in the Bank's personnel, in its banking policies, or in the safety of its deposits resulting from the Transamerica acquisition of Bank shares, the lower court has imposed a requirement beyond the plain terms of the statute. As stated, should it become necessary for the Board to take action under the Condition, and the Bank refuses to withdraw following receipt of the sixty days' written notice, the Board may institute proceedings under Section 9(8) of the Act to expel the Bank from System membership.⁷ The Board will then hold a hearing, but the only finding which the Board is required by the statute to make is that the Bank "has failed to comply with the provisions of this section"—in this case with a condition lawfully imposed pursuant to Paragraph 1 of that section.⁸

In holding that the Condition literally interpreted was unrelated to matters which the Board had lawfully

⁷ "If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section."

⁸ The Board's Resolution (*supra*, p. 4), concluding that it will not invoke the Condition because of Transamerica's present acquisition of shares, was based on the finding that "there had been no substantial change in the control, management or policy" resulting from the acquisition. The Resolution clearly implies that if in the future Transamerica's acquisition should cause a change in control, management or policy, the Board would feel free to invoke the Condition without the necessity of making additional findings, which would otherwise be required under Condition No. 1, as to a lessening of safety to depositors.

considered and in requiring the Condition to be given a restrictive construction, the opinion below also appears to conflict with the decisions of this Court defining the boundaries of judicial interference with administrative discretion. The determination as to what conditions of membership should be imposed requires the appraisal of imponderables calling for highly technical and expert judgment, judgment which Congress has entrusted to the Federal Reserve Board. "It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 112; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194. And there is special reason for heeding the admonition that courts are not to override the exercise of administrative discretion in the field of banking, as many decisions show. *Adams v. Nagle*, 303 U. S. 532; *Kennedy v. Gibson*, 8 Wall. 498; *National Bank v. Case*, 99 U. S. 628; *Bushnell v. Leland*, 164 U. S. 684; *Apfel v. Mellon, et al.*, 33 F. 2d 805 (App. D. C.), certiorari denied, 280 U. S. 585; *Raichle v. Federal Reserve Bank*, 34 F. 2d 910 (C. C. A. 2); *United States Savings Bank v. Morgenthau*, 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605, rehearing denied, 301 U. S. 666.

(2) Petitioners also submit that since respondent accepted the Condition as a means of obtaining valuable federal privileges which otherwise it would not have obtained, it is now estopped from challenging the validity of the Condition. The complaint was dismissed by

the District Judge solely on this ground (R. 113-117). The court below reversed, holding that whether respondent is estopped in this case "depends entirely upon whether Condition No. 4 is valid or invalid." (R. 131.) This ruling ignores fundamental principles defining the circumstances under which estoppels arise. Its effect is virtually to eliminate estoppel as a defense in any action in which administrative action is challenged; a result plainly in conflict with the principles announced in numerous decisions of this Court.

Whether or not waiver or estoppel has occurred in a particular case is clearly unrelated to the merits of the right asserted. Indeed, if proven, either precludes judicial inquiry into the merits of the claim. Thus this Court in numerous decisions has held that one who obtains the privileges or benefits under a statute is thereafter estopped from challenging other provisions of that statute, even on constitutional grounds. *United Fuel Gas Company v. Railroad Commission*, 278 U. S. 300; *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U. S. 125; *St. Louis Malleable Casting Company v. Prendergast Construction Company*, 260 U. S. 469. "There is nothing in the nature of such a constitutional right . . . to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Corporation v. Phoenix Refining Company*, *supra*, 259 U. S. 125, 128-129.¹⁰

⁹ See also *Hurley v. Commission of Fisheries*, 257 U. S. 223; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407. Compare *United States v. City and County of San Francisco*, 310 U. S. 16, 28-29.

¹⁰ " . . . appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of

We perceive no valid distinction between an estoppel applied to prevent a challenge of the constitutional authority of a State legislature or the Congress to enact a particular statute, and one applied to prevent a challenge of action by an administrative agency. In each case the fundamental objection to validity is that the body which has acted has done so in a manner not permitted by the written law which defines its authority. And this proposition seems to have been recognized by the Court of Appeals for the First Circuit, *White Star Bus Line v. People of Puerto Rico*, 75 F. 2d 889 (C. C. A. 1), certiorari denied, 296 U. S. 606, in an opinion with which the court below seemingly disagrees (R. 130-131).

(3) The question is also presented as to whether respondent's action was prematurely brought. By granting a declaratory judgment on the present record the lower court ignored the well-settled principle that the Declaratory Judgment Act does not authorize the Federal courts to issue "an advisory decree" upon "hypothetical controversies which may never become real". *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 443; *Coffman v. Breeze Corporations, Inc.*, 323 U. S. 316, 324.¹¹

its real purpose, it asks relief from the condition only after it has enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee. See *Davis v. Waklee*, 156 U. S. 680." Stone, dissenting, *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 342.

¹¹ See also *Maryland Casualty Co. v. Pacific Co.*, 312 U. S. 270, 273; *Helco Products Co. v. McNutt*, 137 F. 2d 681 (App. D. C.).

This Court has held that an indispensable element of justiciability in suits against public officers of the kind involved here is a showing of either positive action or a threat to take such action by the officials involved. "The pronouncements, policies and program of [public authorities] . . . , their motives and desires, [do] not give rise to a justiciable controversy save as they [have] fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324. The record in this case indisputably shows that the Board has neither acted nor threatened to act under the Condition. Although not acceding to respondent's demand that the Condition be cancelled, the Board, as we have seen, had concluded that there was no present need for action under the Condition. And the Condition itself requires that the Board must first give respondent sixty days' notice of an intention to invoke it. Such a period would afford respondent ample time within which to test its rights, if any, to have the Condition reviewed by the courts. Clearly, therefore, the majority below were in error in concluding that a legal threat is implicit in the Condition itself.

² In addition, if respondent refuses to withdraw from the System, it will be entitled to an administrative hearing before expulsion, and the ultimate administrative decision could be judicially reviewed. Cf. *Federal Reserve Board v. Agnew*, 329 U. S. 441. Accordingly, the case is also premature because respondent has not exhausted its administrative remedy.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

✓ GEORGE T. WASHINGTON,
Acting Solicitor General.

GEORGE B. VEST,
General Counsel,
Board of Governors,
Federal Reserve System.

MAY, 1947.

APPENDIX.

Section 9 of the Federal Reserve Act (12 U. S. C. § 321, et seq.) provides in pertinent part as follows:

SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.

* * * * *

In acting upon such applications the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this Act.

* * * * *

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a

member bank has failed to comply with the provisions of this section, or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor; it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Section 12B of the Federal Reserve Act (12 U. S. C. 264(a), et seq.) provides in pertinent part as follows:

(e) (1) * * *

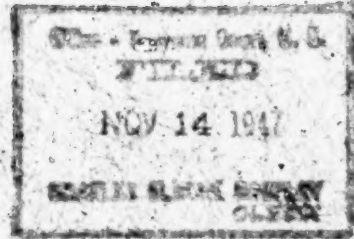
(2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided*, That in the case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Re-

serve System in the case of a State member bank, and that consideration has been given to the factors enumerated in subsection (g) of this section.

* * * * *

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section.

FILE COPY



No. 101

IN THE
Supreme Court of the United States
OCTOBER TERM, 1947.

MARRINER S. ECCLES, RONALD RANSOM; M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST G. DRAPER and RUDOLPH
M. EVANS, PETITIONERS,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONERS.

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OPINION BELOW.

The opinion of the United States Court of Appeals (R. 120-134) is reported at 161 F. 2d 636. There were two opinions in the District Court which were reviewed on the appeal below. The first (R. 11-23), which was rendered in connection with an interlocutory order denying petitioners' motion to dismiss for lack of a justiciable controversy, is reported at 64 F. Supp. 811. The second (R. 113-117), upon which judgment dismissing the action was entered, is not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 14, 1947 (R. 134). The petition for a writ of certiorari was filed on May 23, 1947, and granted on October 13, 1947 (R. 135). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Whether the Board exceeded its statutory authority in conditioning respondent's admission to the Federal Reserve System upon the maintaining of its independence of Transamerica Corporation.

(2) Whether respondent, having voluntarily accepted the Condition as a means of obtaining valuable federal privileges, is not estopped from challenging the validity of the Condition.

(3) Whether the District Court had jurisdiction to entertain a declaratory judgment action attacking the validity of the Condition, the Board having neither acted nor threatened to act under the Condition.

STATUTE INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 43-50.

STATEMENT.

Petitioners are members of the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board).¹ Respondent, Peoples Bank of Lakewood Village, California (hereinafter sometimes re-

¹ The term of office of John K. McKee expired on January 31, 1946. His successor qualified on April 4, 1946. For this reason the District Court dismissed the complaint as to him (R. 117). The Court of Appeals neither affirmed nor reversed this action.

ferred to as the Bank), is a state bank organized and chartered under the laws of the State of California (R. 2).

On November 28, 1941, the Bank applied to the Board to be admitted as a member bank in the Federal Reserve System (R. 3). On February 14, 1942, the Board instructed the Federal Reserve Bank of San Francisco to notify respondent that the Board was "unwilling to approve the application on the basis of the information now before it" (R. 49).

Thereafter, on February 20, 1942, respondent, by letter addressed to the Board, requested the Board to reconsider its application, calling attention among other things to the fact that certain individuals had taken over the stock interest of the West Coast Securities Company, amounting in the aggregate to 1,000 shares out of a total of 5,000 shares outstanding (R. 50-51). On March 11, 1942, the Bank was notified that the Board would be glad to reconsider the application provided the Bank could demonstrate:

"1. That arrangements have been made by Mr. John S. Griffith, San Marino, California, for financing the purchase of his stock in a manner different from that in effect at the time of our investigation of your bank's application for membership, and that such arrangements are consistent with the other provisions of this letter.

"2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.

"3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank

holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

"4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

"5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such." (R. 53-54)

In a letter dated April 23, 1942, respondent met the Board's conditions by forwarding to the Federal Reserve Bank of San Francisco (1) a statement by Mr. Griffith affirming that he had effected a different arrangement for financing his acquisition of Bank shares and that such arrangements had not been made with Transamerica Corporation or any organization affiliated or closely identified with Transamerica Corporation; (2) a declaration signed by all of respondent's directors that respondent was "organized as a bona fide local, independent institution", and that it was not obligated in any manner to Transamerica Corporation or any of its affiliated companies; and (3) a signed statement of each of respondent's stockholders that he had no arrangements, express or implied, with respect to the sale or transfer of the stock of the Bank owned by him to Transamerica or any of its affiliated companies and that he did not intend to enter into any such arrangements in the future (R. 54-58).

Based upon these representations the Board, by letter dated May 6, 1942 (R. 58-61), notified the respondent that its application had been approved sub-

ject to three standard conditions of membership² and one special condition of membership providing as follows:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the

² Section 6(a) of the Board's Regulation H, under which respondent applied for System membership, provides as follows:

"(a) Conditions applicable to all institutions applying for membership.—Pursuant to the authority contained in the first paragraph of section 9 of the Federal Reserve Act, which authorizes the Board to permit applying State banks to become members of the Federal Reserve System 'subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto,' the Board, except as hereinafter stated, will prescribe the following conditions of membership for each State bank hereafter applying for admission to the Federal Reserve System and, in addition, such other conditions as may be considered necessary or advisable in the particular case—

"1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

"2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

"3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation."

Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

In its letter of notification the Board stated, *inter alia*, as follows:

"The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status."

As also stated in the Board's letter of May 6, 1942, before membership status could attach respondent was required to evidence its acceptance of the conditions outlined in the Board's letter of May 6, 1942, by formal resolution, a certified copy of which was required to be filed with the Federal Reserve Bank of San Francisco.

In February 1944 Transamerica Corporation, without prior approval of the Board and without the knowledge of the Bank, acquired a number of the Bank shares, which were registered in its name on the Bank's records, (R. 6). Respondent reported this fact to the Board and in December 1945 demanded that Condition

No. 4 be cancelled (R. 7). This demand was not complied with, and thereafter this proceeding was commenced by the Bank to have Condition No. 4 declared invalid and to enjoin the Board from enforcing the same; although it was not alleged in the complaint that the Board had made any attempt to enforce the Condition.

Petitioners first moved to dismiss the complaint in the District Court on the ground that, as they had not threatened to enforce the Condition, no justiciable controversy was presented by the pleadings (R. 10). In support of this motion petitioners submitted, in affidavit form, an excerpt from the minutes of the Board of January 28, 1946, as follows:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation." (R. 10-11).

Petitioners' motion to dismiss was denied on March 14, 1946 (R. 23).

Thereafter petitioners filed their joint and several answer in which they set forth two defenses. The first was that the Bank, having enjoyed for almost four years the benefit of System membership which resulted from its voluntary acceptance of Condition No. 4, was estopped from challenging the validity of the Condition. The second defense was that the complaint failed to state facts upon which any relief could be granted (R. 23-24).

On this state of the record petitioners moved for judgment on the pleadings (R. 25). The Bank countered with a motion for summary judgment, filing a number of affidavits in support of its motion (R. 25-111).³ It was stipulated that any relevant and admissible facts contained in these affidavits might be considered by the District Court in considering both motions (R. 111). On June 3, 1946, that court granted petitioners' motion for judgment on the pleadings, holding that the Bank was legally estopped from challenging the Condition (R. 113-118). At the same time the court denied respondent's motion for summary judgment (R. 118). Judgment dismissing the complaint was entered on June 6, 1946 (R. 118). On appeal the court below reversed, Mr. Justice Edgerton dissenting (R. 120-134).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that Condition No. 4 as literally construed is invalid because of an alleged unlawful "purpose" of the Board in imposing the Condition.

(2) In holding that the Board and its counsel made certain alleged "concessions" having the effect of modifying the literal terms of the Condition in the manner stated in the majority opinion.

³ In addition to stating the events leading up to the admission of the Bank to the System, which have been described in the preceding pages, these affidavits contain copies of general correspondence between the Board and Transamerica with relation to the Board's position respecting the bank expansion program of that corporation. In addition, they contain numerous statements by the Board and its officers in which they admitted that the law as it now stands does not empower the Board to disapprove bank acquisitions by bank holding companies generally.

(3) In holding that respondent is not legally estopped from challenging the validity of Condition No. 4.

(4) In failing to hold that the case was premature because the complaint fails to disclose a justiciable controversy.

(5) In overruling the judgment of the District Court.

SUMMARY OF ARGUMENT.

I.

The Board has the express power to impose conditions of membership "pursuant" to the Federal Reserve Act. Condition No. 4 appears on its face to be related to "character of management", "convenience and needs of the community to be served", as well as other special factors which the Board was required by the statute to consider in passing upon respondent's application. For this reason the Condition is one which is plainly "pursuant" to the Act.

Furthermore, the determination as to what conditions of membership should be imposed in a particular case requires the appraisal of imponderables calling for highly technical and expert judgment, judgment which Congress has entrusted to the Board. The courts will not substitute their judgment for that of an administrative agency in such a situation. Cf. *Adams v. Nagle*, 303 U. S. 532; *Apfel v. Mellon*, 33 F. 2d 805 (App. D. C.), certiorari denied 280 U. S. 585; *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 112; *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 194.

The record does not support the conclusion reached by the majority below that the Board's "purpose" in imposing Condition No. 4 was "to check the growth of Transamerica Corporation". If the Board's motive

be a relevant consideration in this case, however, the facts which were before the court below supply a number of valid motives for the Board's action. They show (1) that, at or about the time of respondent's application, the Board considered the financial policies of the Transamerica management to be against the public interest and its bank expansion program to be unsound and had reason to believe that respondent was already under, or was about to come under, the control of Transamerica; (2) that the Board's opinion of the financial policies and bank expansion program of Transamerica was concurred in by both the Comptroller of the Currency and the Federal Deposit Insurance Corporation, the latter having indicated its unwillingness to further extend the insurance liability of the United States to the Transamerica controlled group of banks; and (3) that Transamerica already controls a dominant portion of the banking offices and deposits in the five-State area of Arizona, California, Nevada, Oregon and Washington. In the light of these facts the Board could properly have imposed Condition No. 4 (1) to protect respondent from coming under the domination of a management which the Board considered inimical to respondent's welfare or that of the Federal Reserve System; (2) to protect the United States Government against an over-extension of its insurance liability to the Transamerica-controlled group of banks; and (3) to discharge its direct responsibility under the Clayton Act to carry out the national policy against restraints of commerce and monopolies. Cf. *National Broadcasting Company v. United States*, 319 U. S. 190.

II.

Nor was the lower court justified in rewriting the Condition in the light of certain "concessions" al-

leged to have been made by the Board and its counsel since this suit was commenced. None of these "concessions" evidence any intention on the part of the Board either to interpret Condition No. 4 in the manner found below or to limit the Board's right to enforce the Condition in a manner authorized by the statute.

III.

Petitioners also submit that, since respondent accepted the Condition as a means of obtaining valuable federal privileges which otherwise it would not have obtained, it is now estopped from challenging the validity of the Condition. In holding that whether or not waiver or estoppel has occurred in this case depends upon the validity of Condition No. 4, the majority below ignored fundamental principles defining the circumstances under which estoppels arise. The situation here is analogous to that in numerous cases in which this Court has held that one who obtains the privileges or benefits under a statute is thereafter estopped from challenging other provisions of that statute even on constitutional grounds. Cf. *Fahey v. Mallonee*, 332 U. S. 245; *United States v. City and County of San Francisco*, 310 U. S. 16; *White Star Bus Line v. People of Puerto Rico*, 75 F.2d 889, (C. C. A. 1) certiorari denied, 296 U. S. 606.

IV.

As the record indisputably shows, the Board has neither acted nor threatened to take action under Condition No. 4. Furthermore, the Condition itself requires that before the Board may taken action thereunder it must give respondent sixty days' notice of an intention to invoke it. Under these circumstances, there is no justiciable controversy of a definite and concrete character for the Court's determination.

ARGUMENT.

I.

THE CONDITION IS VALID.

Section 9 of the Federal Reserve Act grants specific authority to the Board to impose "such conditions" of membership "as it may prescribe" which are "pursuant" to that Act. The issue on the merits is therefore a relatively narrow one: Is Condition No. 4 one which is "pursuant" to the Federal Reserve Act. While theoretically this question opens a wide range of judicial inquiry—for it makes relevant an analysis of all of the provisions of the Federal Reserve Act and their functions in effectuating the statutory scheme—we think that in the instant case such inquiry may be restricted to a consideration of but two sections of the Act, which deal directly with the qualifications of non-member banks for admission to the System.

When it receives the application of a non-insured State bank (the situation in the case at bar), the Board is required by the statute to "consider" two sets of critical data respecting the applicant. The first, which relates to the bank's eligibility for admission to the System, concerns "the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers are consistent with the purposes" of the Federal Reserve Act. (Section 9(3), 12 U. S. C. 322). The second, which relates to the bank's eligibility for federal deposit insurance coverage,⁴ includes "the financial history and condition

⁴ The federal deposit insurance system is created by Section 12B of the Federal Reserve Act (12 U. S. C. 264, et seq.), and it is therefore appropriate for the Board to take that section into account in prescribing conditions "pursuant" to the Act. Under the Act deposit insurance coverage may be obtained by a bank in one of two ways. It may apply directly to the Federal Deposit Insurance Corporation, in which event the Board takes no part in the con-

of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes" of the insurance section of the Act. (Section 12B(g), 12 U. S. C. 264 (g))

Condition No. 4 on its face relates to at least two of the subjects thus required to be considered by the Board in passing upon respondent's application. The first is the "general character of [the Bank's] management". It is elementary that the responsibility for supplying the management of a corporation is placed by law upon its stockholders. As pointed out in the majority opinion below, Transamerica is a large holding company "with extensive interests in many banks and in other corporations as well" (R. 124-125). The likelihood that Transamerica, by becoming a stockholder in the respondent Bank, might participate in or even supply the management of that institution—hence, affecting the "character" of that management—was a factor which was thus quite properly within the lawful range of the Board's inquiry under the statute. This Court has recognized that ownership of a majority of the voting shares of one corporation by another is not necessary in order to obtain practical working

sideration of the bank's application. Or, as here, a non-insured bank may apply for membership in the System, in which event its admission automatically entitles it to federal insurance coverage. This, of course, makes it essential for the Board to take into consideration the applicant's qualifications for insurance in addition to the factors which it would otherwise consider. In fact, when it admits a non-insured bank to membership the Board is required to certify to the Federal Deposit Insurance Corporation that it has considered those qualifications. (12 U. S. C. 264(e)(2))

control of such company. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships." *North American Company v. Securities and Exchange Commission*, 327 U. S. 686, 693.

The terms of the Condition show that it is also related to "the convenience and needs of the community to be served by the bank", another subject which the Board was required by the statute to consider. As we have seen, the Bank's application was approved because of the Bank's character as a "bona fide local independent institution" (R. 60)—a condition which the Board obviously concluded was in the best interest of the community in which the Bank proposed to do business. The Board could properly have concluded that to permit Transamerica, with its vast chain of banks, to obtain an interest in respondent might not only affect the character of respondent's management but might also destroy the "independent" character of the Bank. As the Board pointed out in its letter of notification to the Bank, Condition No. 4, was "designed to maintain that status" (R. 60).

The Condition was thus plainly related on its face to matters which the Board was required by the statute specifically to consider;⁵ this in itself negatives the idea

⁵ While for obvious reasons the Board treats as confidential its action upon membership applications; nevertheless the Board has informed the Solicitor General that, over the years, it has imposed a wide variety of membership conditions, many of which are not dissimilar to the case at bar. Thus, the Board has required that, prior to membership, the applying bank "shall cause its wholly

that the Board acted "in the teeth of [the] statute" (*Adams v. Nagle*, 303 U. S. 532), or that the object sought to be accomplished by the Condition was "so unrelated to the tasks entrusted by the Congress to the [Board] as in effect to deny a sensible exercise of judgment". (*Gray v. Powell*, 314 U. S. 402) Under these circumstances, it is submitted that the judicial inquiry into the validity of Condition No. 4 should be at an end, for "where the regulation [condition] is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Co. v. White*, 296 U. S. 176, 186. Obviously, it was never intended by Congress that recourse to the courts should be had in all instances to review the Board's appraisal of such imponderables as "character of management", "the convenience and needs of the community to be served", and the others outlined above. The statute neither requires the Board to hold hearings or to make findings respecting these subjects, nor does it provide for judicial review of the Board's determinations thereupon. Here, as in other governmental schemes involving highly technical subjects,

owned affiliate . . . to dispose of any shares of the bank's own stock which may be owned by the company"; or that the bank "shall dispose of all stock you now hold or may acquire in the _____ Title and Mortgage Company"; or that the bank "shall require that the offices of the _____ Building and Loan Association be removed from the banking offices of such bank and shall confine its relations with such association to the usual banking services offered to any customer of such bank"; or that the bank "shall dispose of the ownership of all stock held in the _____ National Bank, or effect a consolidation with that bank"; or that "the management of the new bank shall be satisfactory to the Federal Reserve Agent at Boston."

Congress created an administrative board and provided it with the necessary means for dealing with the subject on an expert and definitive basis.⁶

The rule is clear that the courts will not substitute their judgment for that of an administrative agency in a matter that is within the discretionary authority of such agency. Here the Board is given a wide discretion to impose "such conditions as it may prescribe pursuant" to the Act. And the position has been consistently taken at all levels of the federal judiciary that the orders and decisions of the bank supervisory agencies of the kind involved in the instant case call for the exercise of the broadest kind of expert judgment and discretion which the courts will not undertake to review. Thus, the case of *Apfel v. Mellon, et al.*, 33 F. 2d 805, certiorari denied 280 U. S. 585, involved a situation almost identical to that here presented. In that case plaintiffs sued to compel the members of the Board to issue a permit permitting them to engage in foreign banking activities. Under the provisions of Section 25(a) of the Federal Reserve Act (12 U. S. C. 611), five or more persons may file with the Board articles of association for the purpose of engaging in the business of foreign banking and "after the Board of Governors of the Federal Reserve System has approved the same and issued a permit to begin business," the association becomes a body corporate with certain statutory powers. Plaintiffs had duly filed their

⁶ "The soundness of the judgment exercised by the individual or body to whom the task was confided would depend largely upon the extent both of the knowledge of the special subject possessed and of the experience had in dealing with this particular class of problems. The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof." *Williamsport Wire Rope Company v. United States*, 277 U. S. 551.

articles of association with the Board, but the latter declined to approve the same. Plaintiffs brought suit for a writ of mandamus to compel the Board to issue the permit. The case was dismissed in the District Court, and the Court of Appeals affirmed, stating, *inter alia*, as follows:

"In the instant case it is clear that Congress was providing a means for conferring special and important privileges upon such corporations as should be organized under the Edge Act. An abuse by any corporation of the powers thus granted to it might involve grave consequences to our public service. It is reasonable to believe that Congress intended that a careful investigation should be made by the Federal Reserve Board concerning the character and competency of the incorporators of such an enterprise, as one of the means of determining whether to grant or withhold their approval of the application for incorporation. Moreover, it should be noted that the act repeatedly provides for an 'approval' by the Board as a prerequisite to proceedings authorized thereunder, and in all such instances the term plainly implies the exercise of consideration, judgment, and discretion by the Board."

This Court has affirmed a similar doctrine. In *Adams v. Nagle*, 303 U. S. 532, plaintiff sought to have set aside an order of the Comptroller of the Currency levying certain assessments under the double liability provisions of the National Bank Act against stockholders of closed banks. In refusing to inquire into the basis for the Comptroller's order, the Court said:

"The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no appli-

eration for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; *but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion.* Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority." (Italics ours)

See also *Kennedy v. Gibson*, 8 Wall. 498, 505; *National Bank v. Case*, 99 U. S. 628, 634; *Bushnell v. Leland*, 164 U. S. 684; *Raichle v. Federal Reserve Bank*, 34 F. 2d 910 (C. C. A. 2); *United States Savings Bank v. Morgenthau*, 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605, rehearing denied, 301 U. S. 666.

The majority below rejected the argument that, in imposing Condition No. 4, the Board was acting within the permissible range of its statutory discretion. It did so on the theory that the Condition was rendered invalid by an alleged "purpose" which the court found to have motivated the Board at the time it imposed the Condition. That "purpose," as found by the court, was "to check the growth of Transamerica Corporation, which the Board considered to be already too large" (R. 125). The opinion, having thus stated the "purpose" of Condition No. 4, goes on at some length to demonstrate the fact, which the Board admitted below and has never denied, that, while the Board

enjoys some power of direct regulation over bank holding companies,⁷ such power does not include the authority to approve or disapprove bank holding company expansion. The reasoning of the opinion seems to be that Condition No. 4 was but an attempt by the Board "to implement its theory that the enlargement of bank holding companies should be forbidden" (R. 125) and, hence, was unrelated to any legitimate considerations affecting the Bank's admission to the Federal Reserve System. We believe that the error of this position may be readily demonstrated.

In the first place, even assuming the relevance of the Board's motive in imposing Condition No. 4, we do not believe the record in this case supports the finding of the majority below that the Board's purpose was "to check the growth of Transamerica Corporation." The complaint does not allege any such purpose. The Board's answer was limited solely to legal defenses, hence it contains no facts upon which such a conclusion could have been drawn. The only other material in the record is that contained in certain affidavits submitted in conjunction with respondent's motion for summary judgment. Aside from copies of the purely formal documents and correspondence attending respondent's membership application, a good portion of this material consists of copies of certain correspondence between the Board and Transamerica (R. 69-96). But this correspondence, as even a cursory examination will show, has not the remotest connection with Condition No. 4 or with respondent Bank. It deals with a variety of problems with which the Board was confronted in its supervisory relationships with Transamerica and the Bank of America National

⁷ See Section 5144 of the Revised Statutes, 12 U. S. C. 61, which is set out in the Appendix hereto at page 45 et seq.

Trust & Savings Association. It does contain a number of references to the attitude of the Board (and that of the Comptroller of the Currency and the Federal Deposit Insurance Corporation) respecting the Transamerica bank expansion program. As stated, however, none of these make any reference whatever to respondent or to Condition No. 4.

In the second place, if the lower court was justified in seeking out the motive behind Condition No. 4, it at least was under a duty, we submit, to credit the Board with having entertained a lawful purpose if any of the facts which were before that court would justify such a conclusion. After all, "official acts of public officers" are supported by a "presumption of regularity" (*United States v. Chemical Foundation*, 272 U. S. 1, 14), not the contrary. And there were many facts before the lower court from which it could have found a number of entirely lawful motives, directly traceable to the statute itself, which give valid support to the Board's requirement that respondent maintain its independence of Transamerica.

For example, the record shows that, at or about the time the Board acted upon respondent's application, it was of the opinion that the Transamerica financial policies were contrary to the public interest and the Transamerica bank expansion program was unsound. This fact appears in a letter from the Board to Transamerica dated November 13, 1942, in which the Board stated, *inter alia*, as follows:

"As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest, it will consider as unsound their efforts to continue an expansion program by whatever means, including

the organization of new State banks, the acquisition of control of existing State banks; or the conversion of national banks to State banks, and the establishment of branches thereof." (R. 84)

The record also shows that, contrary to the conclusion stated by the court below (R. 125), the Board had good reason for believing that respondent, at the time it applied for System membership, might already be beneficially owned by or at least affiliated with Transamerica. Thus, the record shows that arrangements had been made between respondent and Transamerica for the use of Transamerica-owned furniture and fixtures in commencing its operations.⁸ It also shows that one-fifth of respondent's shares were originally owned by West Coast Securities Company (R. 51). While the record does not show what affiliation that company had with Transamerica, nevertheless, it does show that its shares of respondent's stock were transferred to five individuals before the Bank requested reconsideration of its application and that the fact of this transfer was specifically called to the Board's attention in respondent's letter urging such reconsideration (R. 51). When we add the further fact that this transfer was effected after a conference in Washington between one of respondent's directors and officials of the Board, in which the director was told that the Board would reconsider respondent's application only after it had received "assurances" of the Bank's independence of Transamerica (R. 62), we think the

⁸ This arrangement was subsequently explained in the Bank's letter to the Board of April 23, 1942 (R. 55), and assurances were also subsequently given by all the directors that the Bank was not obligated to any company in the Transamerica group for the purchase of its furniture and fixtures.

record sustains the inference that West Coast Securities Company was a Transamerica affiliate.

In addition, it also appears that the purchase of the shares originally acquired by one of respondent's directors had been financed by Transamerica or one of its affiliated companies. This is shown by the requirement stated in the Board's letter of March 11, 1942, that such director finance such purchase in a different manner (R. 53), plus the director's subsequent statement (R. 56) that he had effected a "different arrangement" for financing those shares, and that such arrangements had not been made with Transamerica or its affiliates. The fact that Transamerica had thus undertaken to finance the purchase of other of respondent shares naturally suggested questions as to where the beneficial ownership of such shares might be lodged.

All of these facts supply ample reason for the Board's concern that Transamerica had marked respondent for inclusion within its vast banking system. Being also of the opinion that the management policies of Transamerica were at that time both unsound and against the public interest, the Board was clearly justified in apprehending the effect of those policies upon respondent should Transamerica thereafter acquire an interest in the Bank. Certainly the fact that the Board deemed the further expansion of Transamerica contrary to the public interest would not mean that restrictions upon respondent so as to preserve its independence of Transamerica were not conditions related to the character of respondent's management, a matter which the Board was thus specifically required to consider.

And in imposing the restrictive requirements of Condition No. 4 the Board was protecting not only the respondent Bank, but the Federal Reserve System as

well.⁹ It is clear, of course, that the member banks constitute the bloodstream of that System. If they are sound, virile institutions, then the over-all banking structure of which they are a part will likewise be strong and healthy, and capable of producing maximum results in the public interest. On the other hand, if even one of them is weak and unhealthy, then it drains the strength of the others. Confronted with the facts which the investigation of respondent's application had disclosed, and entertaining the opinion which it did concerning the possible adverse effect upon respondent's management should Transamerica acquire a stock interest therein, the Board's plain duty under the statute required that it take the precautionary step which it did. We think the facts related above clearly supply a valid "purpose" for such action.

There are other facts in the record from which the majority below could have found another valid motive for the imposition of Condition No. 4. The record shows that at the time of respondent's application the Board's opinion as to the unsoundness of the Transamerica bank expansion program was shared by the two other federal bank supervisory agencies, the Comptroller of the Currency and the Federal Deposit Insurance Corporation (R. 69-70, 82-85). Indeed, the latter had "indicated its unwillingness . . . to insure any newly organized State nonmember bank in which Transamerica Corporation ha[d] a substantial interest." (R. 84) These facts are important not only because the judgment of these agencies gives valid and expert support to the Board's opinion, but also because

⁹ As stated in the preamble to the Federal Reserve Act, one of the broad purposes of that Act was "to establish a more effective supervision of banking in the United States," and thus to create and maintain a sound banking system for the country.

it emphasizes another facet of the Board's responsibility in passing upon respondent's application. As pointed out above, the Board, by admitting a non-insured bank to membership, automatically grants to it federal deposit insurance coverage. There are of course obvious reasons for not permitting too large a portion of such insurance to cover a single organization. And if the Federal Deposit Insurance Corporation, the agency primarily charged with the administration of this phase of the federal banking scheme, itself had determined that Transamerica's bank expansion program was so unsound as to justify a refusal to further extend the insurance liability of the United States to the Transamerica banking group, then it seems clear that such determination was entitled to the highest respect by the Board. This situation supplies another "purpose" directly traceable to the statute itself.

And there is still another valid "purpose", which could have been found by the majority below. The lower court was referred to, and asked to take judicial notice of, a table appearing in the Congressional Record (Vol. 90, Part 10, 78th Cong., 2nd Session, page A3018) in which the size and extent of the Transamerica banking empire is shown as of December 31, 1943. That table is as follows:

BANKS AND BRANCHES IN THE TRANSAMERICA CORPORATION GROUP COMPARED WITH ALL BANKS AND BRANCHES IN THE SAME STATES, DEC. 31, 1943.

[Amounts in thousands of dollars]

	Banks	Branches	Banks and branches	Deposits of banks and branches ¹⁰
Transamerica Corporation banks: 11				
Arizona	2	3	5	53,082
California	12	495	507	3,660,629
Nevada	4	10	14	80,081
Oregon	9	39	48	370,436
Washington	1	8	9	71,233
Total	28	555	583	4,235,461
All banks in same States: .				
Arizona	12	26	38	229,204
California	208	827	1,035	8,859,654
Nevada	10	13	23	99,098
Oregon	72	68	140	909,136
Washington	131	88	219	1,579,366
Total	433	1,022	1,455	11,676,458
Ratio (percent) of Transamerica banks to all banks in same States:				
Arizona	16.7	11.5	13.2	23.2
California	5.8	59.9	49.0	41.3
Nevada	40.0	76.9	60.9	80.8
Oregon	12.5	57.4	34.3	40.7
Washington8	9.1	4.1	4.5
Total	6.5	54.3	40.1	36.3

¹⁰ Separate deposit figures for branches are not available.

¹¹ Includes Bank of America, N. T. & S. A., San Francisco, and National Bank of Washington, Seattle, which are not included in the "26 Transamerica-owned banks" shown in the Transamerica Corporation 1943 annual report but are shown there as "Banks in which Transamerica Corporation and its subsidiaries have substantial minority interests."

NOTE.—The number of branches shown above does not include banking facilities at military reservations provided through arrangements made by the Treasury Department with banks designated as depositories and financial agents of the Government.

This table clearly shows the dominant position which Transamerica has attained over the banking and credit facilities of the five-State area of Arizona, California, Nevada, Oregon and Washington. Each new bank which it acquires further increases this position and *pro tanto* decreases the remaining banking competition in that area. In the light of these figures, the Board, in acting upon respondent's application, might properly have concluded that, as a dispenser of federal privileges in the banking field, it should take into account the national policy against restraints of commerce and monopoly, and should condition respondent's admission to System membership in the light of the statutory objectives of the Sherman and Clayton Acts. This is so, we submit, even if it were not true, as we shall presently show, that the Board is charged with specific responsibility for carrying out certain phases of this policy in the banking field. Authority for this proposition is found in *National Broadcasting Company v. United States*, 319 U. S. 190. In that case the Federal Communications Commission, acting under its general powers to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Federal Communications Act, promulgated a series of regulations which, among other things, were directed to the preservation of competition within the broadcasting field. It was contended that this part of the regulations was not necessary to "carry out the provisions" of the Communications Act and constituted "an ultra vires attempt by the Commission to enforce the antitrust laws." The Court disposed of this contention by quoting with approval from the Commission's Report, which reads in part as follows (p. 223):

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve * * * It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest."

We submit that such a view without more would support the Board's action in conditioning the entry of a bank into the Federal Reserve System against affiliation with so gigantic a banking empire as that controlled by Transamerica. The Board could say, as did the Communications Commission, that "The prohibitions of the Sherman Act apply to [banking]"; and that, even though "not charged with the duty of enforcing that law, [it] should administer its regulatory powers with respect to [banking] in the light of the purposes which the Sherman Act was designed to achieve."

As indicated above, however, we are not limited here to arguing on the basis of the Board's *general* power to consider the national policy against monopoly in passing upon membership applications, for by Section 11 of

the Clayton Act¹² (15 U. S. C. 21) Congress has placed *direct* responsibility in the Board to enforce certain statutory prohibitions contained in that Act, including those contained in Section 7¹³ (15 U. S. C. 18). The latter section prohibits the acquisition by one company engaged in commerce of the stock of another company engaged in commerce, or the acquisition by one company of the stock of two or more companies engaged in commerce, where the effect of either type of acquisition

¹² "Authority to enforce compliance with sections 13, 14, 18 [Section 7], and 19 of this title by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce. . . ."

¹³ "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

will result in substantially lessened competition or will tend to create a monopoly.

The plain import of this grant of authority is that Congress intended the Board actively to concern itself with carrying out the anti-monopoly policy of our Government in the banking field. And it is particularly pertinent here to note that this phase of the Board's direct responsibility deals with *acquisitions of stocks* having the prohibited effect noted above. Surely such a direct Congressional mandate is one which may properly color any decision by the Board on any matter within its jurisdiction, including the admission of banks to System membership. That it might have influenced the Board in the imposition of Condition No. 4 is a consideration which can hardly be ignored in the face of the figures set out above. Thus we have still another valid "purpose" to support the Condition.

We think it clear from the above discussion that the facts before the lower court would have justified a finding that the Board might have been acting from any one or all of a number of lawful motives in imposing Condition No. 4. Under these circumstances, even if it be assumed that, as found by the majority below, the Board also acted from a desire to "control the size of Transamerica" and that such motive was improper, the latter facts would not affect the validity of Condition No. 4, for this Court has said that "if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it" *Isbrandtsen & Moller Co. v. United States*, 300 U. S. 139. Cf. *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, 184; *United States v. Chemical Foundation*, 272 U. S. 1, 14-15; *Water Service Co. v. Redding*, 304 U. S. 252, 254; *United States v. Rock Royal Co-op.*, 307 U. S. 533, 560.

II.

**THERE IS NO BASIS FOR THE ACTION OF THE LOWER COURT
IN REWRITING THE CONDITION.**

The opinion below having invalidated Condition No. 4 according to its literal terms, goes on to point out a number of "concessions" which are alleged to have been made by the Board and its counsel since the initiation of these proceedings. These "concessions" according to the court had the effect of modifying the literal terms of Condition No. 4 to mean that "if the Board of Governors should determine, after hearing, that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way, it may require the bank to withdraw from the Federal Reserve System." (R. 131). Treating the Condition as so modified the majority below held the Condition valid but instructed the District Court to enter a declaratory judgment limiting its validity accordingly.

The effect of this ruling is to emasculate the Condition. Indeed, the court specifically states that, as modified, the Condition "means no more, and gives the Board no greater authority, than standard Condition No. 1, which is that subject bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors," (R. 130). As we shall show, however, there is no justification for the action of the majority in thus stripping the Condition of its vitality.

One of the sources of the so-called "concessions" found by the lower court was a certain resolution passed by the Board on January 28, 1946, a date more than a month after the filing of the complaint herein. It reads as follows:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation." (R. 10-11)

This resolution was submitted to the District Court in support of the Board's motion to dismiss the complaint for lack of a justiciable controversy (R. 10). It was intended to show, and only to show, that the Board had neither acted nor threatened to act under the Condition at the time this suit was brought. In fact the majority below recognized this as the real purpose of the resolution, for in its opinion it calls attention specifically to the fact that the resolution "was primarily intended as an aid to the appellees' motion to dismiss the complaint" (R. 129). Such being the admitted purpose of the resolution, and there being nothing in its literal terms to suggest that the Board entertained the additional purpose of administratively interpreting Condition No. 4, we think the lower court's conclusion that it was so intended is wholly gratuitous.

But even if we treat the resolution as an administrative interpretation of Condition No. 4, such an approach still would not vindicate the conclusion reached below. Nothing in the language of the resolution suggests that the Board intended to limit its right to act thereunder only after a finding "that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's per-

sonnel, in its banking policies, [or] in the safety of its deposits” On the contrary, the language of the resolution clearly implies that if in the future Transamerica’s acquisition should cause any substantial change in the Bank’s control, management or policy the Board would feel free to invoke the Condition without the necessity of making any additional finding such as that required by the lower court. This is entirely consistent with the original Condition, which empowered, but did not require, the Board to take action if Transamerica acquired “any interest” in respondent. Certainly such language does not justify the conclusion, reached below, that in adopting the resolution the Board intended to limit its powers under Condition No. 4 to those which it already possessed under Standard Condition No. 1.

The other “concessions” found by the lower court consisted of two extracts from petitioners’ brief below. Aside from the fact that these extracts are separated in the majority opinion from the context in which they were submitted below, the literal texts of these statements do not support the conclusion reached by the majority. Like the Board’s resolution just discussed, both were directed to showing a lack of a justiciable controversy. The first¹⁴ pointed out that the Condition

¹⁴ “Condition No. 4, however, is not self-executing, as appears on its face. And the Board, in affixing the Condition in the light of the opinion which it then entertained as to the potential danger of Transamerica affiliation, did not by so acting declare in advance what its administrative decision might be if and when Transamerica should acquire some of appellant’s shares. In affixing the Condition—by agreement with appellant—the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto. Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced.” (R. 130)

on its face was not self-executing—that its terms plainly required further Board action before the Condition might validly be invoked. The second¹⁵ was a footnote to that portion of petitioners' argument which emphasized that the sixty days' notice provided for in the Condition negated the idea of any imminent threat to respondent's status as a member bank. It pointed out that, even if the sixty days' notice were sent and respondent refused voluntarily to withdraw, as agreed, then, under Section 9(8) (12 U. S. C. 327) of the Act¹⁶ a hearing before the Board would be required before respondent could be expelled for breach of the Condition; and that this rendered even more remote respondent's alleged cause of action. Nothing in the literal language of those statements is inconsistent with or negatives the right of the Board to take action under

¹⁵ "Even should appellant, if and when it receives such notice, take no action pursuant thereto, its membership could not be summarily forfeited. Section 9 of the Act (46 Stat. 250, 251, c. 207, U. S. C., Title 12, § 327) provides that, while the Board may order such a forfeiture, it can only do so 'after hearing' and a finding that appellant 'has failed to comply with the provisions of . . . [the law] of the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto . . .'. Appellant's alleged danger is thus rendered even more remote." (R. 131)

¹⁶ Section 9(8) reads as follows:

"If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section."

the Condition whenever it might appear appropriate to do so. Nor do they even remotely suggest that before the Board can take such action it must first find, after hearing, that the Transamerica ownership of respondent's shares has affected deleteriously respondent's personnel, policies, or the safety of its deposits. All that they do suggest is that, should respondent fail to withdraw from membership after it receives the sixty days' notice, the Board, before it could lawfully expel respondent, must first find, after hearing, that respondent "has failed to comply with the provisions" of the Act—in this case with a condition lawfully imposed pursuant to Section 9 of the Act. This "concession" was no more than the Act requires, and the Board, of course, still adheres to it.

We submit that the conclusion drawn by the lower court from these statements and the resolutions set out above, that condition No. 4 means "no more, and gives the Board, no greater authority, than standard Condition No. 1", is plainly a *non sequitur*. And further, we submit, its action in thus rewriting the Condition is in direct conflict with the "fundamental principle" which this Court emphasized in *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 112, "that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" Cf. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194.

III.

**RESPONDENT IS ESTOPPED FROM ASSERTING THE
INVALIDITY OF CONDITION NO. 4.**

The District Court dismissed the complaint solely on the ground of estoppel. It pointed out that not only did respondent's directors and stockholders willingly comply with the requirements of the Board's letter of March 11, 1942, but also that respondent had "voluntarily agreed to [Condition No. 4] and on the basis of that agreement was admitted to membership in the Federal Reserve System, and for several years has received the benefits of membership in that System."¹⁷ The court further stated:

"The condition here is clearly not one outside the domain of the Federal Government. Here the defendant Board, with discretionary power to admit or to refuse to admit the plaintiff to the privilege of membership in the Federal Reserve System, imposed a condition which was not merely acquiesced in but agreed to by the plaintiff. The claim that this agreement was brought about by

¹⁷ To mention some of the advantages which accrue to a bank as a result of its admission to the System: It can borrow at its Federal Reserve Bank at any time on any sound asset; it can obtain currency promptly and dependably from its nearby Federal Reserve Bank or branch without transportation charge; it collects and clears checks, drafts, bills, etc., through the nationwide clearing system of the twelve Federal Reserve Banks and their twenty-four branches; it can effect prompt telegraphic transfers of funds through the Federal Reserve Bank or branch; it has the use of Federal Reserve Bank facilities in buying and selling Government securities; it has the privilege of depositing its securities in the vaults of the Federal Reserve Bank for safekeeping, collection of interest coupons, redemption, etc. In addition to these services, a member bank has a prime investment in its holding of Federal Reserve Bank stock, which pays a six per cent dividend. Furthermore, as here, System membership automatically entitles a member bank to federal deposit insurance coverage.

duress of the plaintiff is, I think, without foundation. The agreement was voluntarily made, it was acted on and the plaintiff received the benefits which arose from its admission to membership in the System. I see nothing contrary to public policy in the condition agreed upon by the parties; indeed, it may well be that the condition imposed was within the Board's discretion if it was of the opinion that unsound banking policies were being pursued by Transamerica and that the character of management of this plaintiff bank, if Transamerica obtained control, would be detrimental to sound banking." (R. 116-117)

The majority below reversed the District Court on this ruling, stating, *inter alia*, as follows:

"Whether estoppel has arisen, whether waiver has occurred, depends entirely upon whether Condition No. 4 is valid or invalid. No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it." (R. 132)

We submit that the decision below ignores fundamental principles which define the circumstances under which estoppels arise. Whether waiver or estoppel has occurred in a particular case is clearly unrelated to the merits of the ultimate right asserted. Indeed, if proven, either precludes judicial inquiry into the merits of such claim. In holding that whether waiver or estoppel has been shown in this case "depends entirely upon whether Condition No. 4 is valid or invalid," the majority below

has virtually eliminated both as defenses to any suit in which administrative action is challenged, a result which might be productive of great mischief in the administration of many regulatory schemes.

As we have seen, the Board is expressly authorized by the Act to impose conditions of membership and, as the District Court pointed out, the Condition here is "clearly not one outside the domain of the Federal Government." And certainly respondent was under no compulsion to accept the Condition without first making the objection which it now makes. Nor does respondent suggest any valid reason why it did not then resort to the courts to test the validity of that objection. Under such circumstances, we submit, the Board, as a public agency, is as much to be protected against the unconscionable conduct of those with whom it deals as are private litigants under similar circumstances.¹⁸

We think the analogy is strong between the circumstances in the case at bar and those in numerous others in which this Court has held that one who obtains the privileges or benefits under a statute is thereafter estopped from challenging other provisions of that stat-

¹⁸ " . . . appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of its real purpose, it asks relief from the condition only after it has enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee.—See *Davis v. Waklee*, 156 U. S. 680." Stone, J., dissenting, *United States v. Chicago, M. & St. P. & P. R. Co.*, 282 U. S. 311, 342.

ute, even on constitutional grounds. For example, in *Fahey v. Mallonee*, 332 U. S. 245, representatives of the Long Beach Federal Savings and Loan Association sought to have set aside an order of the Federal Home Loan Bank Commissioner appointing a conservator for that Association. It was charged that Section 5(d) of the Home Owners Loan Act, under which the appointment of the conservator had been made, was unconstitutional because it contained a delegation of legislative authority. This Court held the Association estopped from challenging the validity of this section, saying, in part, as follows:—

“It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named.”

Again, in *United States v. City and County of San Francisco*, 310 U. S. 16, the City of San Francisco, upon which Congress had conferred certain rights in the public domain upon the condition, *inter alia*, that it not dispose of or distribute the same through any private corporation or individual, challenged the validity of the condition after its enjoyment of the grant had commenced. In holding the City estopped from making such a challenge, the Court said:

"When the Raker Bill was before Congress, the City filed with the Public Lands Committee of the House a brief and argument in support of the Bill. Citing authorities, including this Court's opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose 'the conditions set forth in the Hetch-Hetchy bill.' After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities, and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions."

See also *United Fuel Gas Company v. Railroad Commission*, 278 U. S. 300; *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U. S. 125; *St. Louis Malleable Casting Company v. Prendergast Construction Company*, 260 U. S. 469; *Hurley v. Commission of Fisheries*, 257 U. S. 223; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407.

The majority below distinguished the present case from those just cited on the ground that here "the litigant charges that the administrative body has exceeded the authority conferred upon it by a statute, but does not attack the validity of the statute." (R. 132). But we perceive no valid distinction between an estoppel applied to prevent a challenge of the constitutional authority of Congress in enacting a particular statute, and one applied to prevent a challenge of action by an administrative agency. In each case the fundamental objection to validity is that the body which has acted has done so in a manner not provided by the written law which defines its authority. And this proposition

seems to have been recognized by the Court of Appeals for the First Circuit in *White Star Line v. People of Puerto Rico*, 75 F. 2d 889 (C. C. A. 1), certiorari denied, 296 U. S. 606, in an opinion with which the court below seemingly disagrees (R. 132). In that case suit was brought by the People of Puerto Rico to recover from defendant bus line a royalty which the latter agreed to pay as a condition to receiving a license to operate its line. The record disclosed that the bus line received a license to operate between San Juan and Rio Piedras upon condition, *inter alia*, that it pay royalties on a graduating scale over the life of the license. When suit was brought to recover the royalties, the bus line contended that the Commission was without authority to impose the royalty condition. In summarily disposing of this point the court said (pp. 891-2):

"The franchise with the proviso added to section 2 was accepted by the bus line, which proceeded to operate under it. It still raises the issue, however, of whether the commission has the authority to impose the payment of annual royalties as a condition of receiving a franchise. Having consented to the imposition of the royalties, if the proviso were added, and operated its bus line since January 1, 1928, under the franchise, it is doubtful whether the bus line is now in a position to raise this issue. *United Fuel Gas Co. et al v. R. R. Commission of Kentucky*, 278 U. S. 300, 307, 308, 49 S. Ct. 150, 73 L. Ed. 390; *Wall et al. v. Parrot Silver & Copper Co. et al.*, 244 U. S. 407, 411, 37 S. Ct. 609, 61 L. Ed. 1229."

IV.

RESPONDENT'S ACTION IS PREMATURE.

The question is also presented as to whether respondent's action was not prematurely brought. This Court has held that an indispensable element of justiciability in declaratory judgment actions against public officers

of the kind involved here is a showing of positive action or a threat to take such action by the officials involved. "The pronouncements, policies and program of [public authorities] . . . , their motives and desires, [do] not give rise to a justiciable controversy save as they [have] fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324.

The record in this case indisputably shows that the Board has neither acted nor threatened to act under the Condition. Although not acceding to respondent's demand that the Condition be cancelled, the Board, as we have seen, had concluded that there was no present need for action under the Condition. And the Condition itself requires that the Board must first give respondent sixty day's written notice of an intention to invoke it. Such a period would afford respondent ample time within which to test its rights, if any, to have the Condition reviewed by the courts. Clearly, therefore, the majority below were in error in concluding that a legal threat is implicit in the Condition itself.

In this posture of the case it appears that respondent is merely attempting to secure judicial determination of a matter as to which admittedly there is a difference of opinion between itself and the Board, but which has not yet reached an adversary stage in the judicial sense, and may never do so. As this Court has said, however, the Declaratory Judgment Act does not authorize the federal courts to issue "an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 443; *Coffman v. Breeze Corporations, Inc.*, 323 U. S. 316, 324.

CONCLUSION.

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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November 1947.

APPENDIX.

Section 9 of the Federal Reserve Act (12 U. S. C. § 321, et seq.) provides in pertinent part as follows:

SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.

* * * * *

In acting upon such applications the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this Act.

* * * * *

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a

member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto; or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Section 12 B of the Federal Reserve Act (12 U. S. C. § 264(a), et seq.) provides in pertinent part as follows:

(c) (1) * * *

(2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided*, That in the case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Reserve System in the case of a State member bank, and that consideration has been

given to the factors enumerated in subsection (g) of this section.

* * * * *

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section.

Section 5144, Revised Statutes (12 U. S. C. 61), provides as follows:

"In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that (1) this shall not be construed as limiting the voting rights of holders of preferred stock under the terms and provisions of articles of association, or amendments thereto, adopted pursuant to the provisions of section 302(a) of the Emergency Banking and Bank Conservation Act, approved March 9, 1933, as amended, (2) in the election of directors, shares of its own stock held by a national bank as sole trustee, whether registered in its own name as such trustee or in the name of its nominee, shall not be voted by the registered owner unless under the terms of the

trust the manner in which such shares shall be voted may be determined by a donor or beneficiary of the trust and unless such donor or beneficiary actually directs how such shares shall be voted, (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee, and (4) shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such bank shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee, such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares.

“For the purpose of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

“Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its shareholders so to vote the same. The Board of Governors of the

Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

“(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations between such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunction with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

“(b) After five years after the enactment of the Banking Act of 1933, every such holding company affiliate (1) shall possess, and shall continue to possess during the life such permit, free and clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such

holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

“(c) Notwithstanding the foregoing provisions of this section, after five years after the enactment of the Banking Act of 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it; and (2) the assets required by this section to be possessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be made up within such period as the Board of Governors of the Federal Reserve System may by regulation prescribe and the provisions of this subsection, instead of subsection (b), shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock;

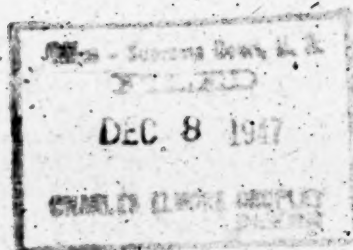
“(d) Every officer, director, agent, and employee of every such holding company affiliate shall be subject to the same penalties for false entries in any book, report, or statement of such holding company affiliate as are applicable to officers, directors, agents, and employees of member banks under section 5209 of the Revised Statutes, as amended (U. S. C., title 12, sec. 592); and

“(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as ‘securities company’); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings.

"If at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days' notice by registered mail of its intention to the holding company affiliate and affording it an opportunity to be heard. Whenever the Board of Governors of the Federal Reserve System shall have revoked any such voting permit, no national bank whose stock is controlled by the holding company affiliate whose permit is so revoked shall receive deposits of public moneys of the United States, nor shall any such national bank pay any further dividend to such holding company affiliate upon any shares of such bank controlled by such holding company affiliate.

"Whenever the Board of Governors of the Federal Reserve System shall have revoked any voting permit as hereinbefore provided, the rights, privileges, and franchises of any or all national banks the stock of which is controlled by such holding company affiliate shall, in the discretion of the Board of Governors of the Federal Reserve System, be subject to forfeiture in accordance with section 2 of the Federal Reserve Act, as amended."

FILE COPY



No. 101

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST G. DRAPER and RUDOLPH
M. EVANS, PETITIONERS,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONERS

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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REPLY BRIEF FOR THE PETITIONERS

It is not the purpose of this brief to reply seriatim to each of the arguments advanced in respondent's brief. There are, however, a number of those arguments which appear to inject considerations not presented by the opinion below and which have not been discussed in our main brief. These are largely confined to Points I and II of respondent's brief and we shall confine our reply to those subjects.

We wish first to address ourselves to a basic but false assumption which permeates a large portion of respondent's

brief and upon which many of its subsidiary arguments are premised. It is that respondent was unable to *control* the disposition of its stock by its stockholders and, hence, was unable to prevent Transamerica from acquiring any of its shares, even if respondent had wished to do so (R. Br. pp. 7-9, 14, 21, 22, 55). From this assumption respondent makes a number of arguments, including the principal one that the Condition is thereby rendered arbitrary and unreasonable and is therefore void.

We think that it is a complete answer to this and all related contentions to point out that respondent, through the stockholders which controlled it at the time of its admission to the System (who gave assurances to the Board that they did "not intend to enter into any" agreements to sell their stock to Transamerica), with perfect validity could have regulated the transfer of its stock to the extent necessary to protect respondent against future violations of the Condition by the simple expedient of adopting a by-law limiting such disposition to meet the requirements of the Condition. In Fletcher, *Cyclopedia Corporations* (Perm. Ed., 1931, Vol. 8, Section 4205, pp. 784-787) it is stated that by-laws designed to protect the corporation and its interests by partially restricting the transfer of the corporation's stock "as by limiting the persons to whom it might be transferred" may be validly enacted by a corporation. Fletcher further points out that "the weight of authority seems to be that such restrictive by-laws are proper and not necessarily objectionable per se, but are consistent with common sense and practical business, especially in the case of corporations of special nature or purposes or those in which the stock carries some special stockholder's liability." Id. Furthermore, the laws of California under which respondent was organized and operates specifically empower a corporation to enact by-laws restricting the transfer of its shares. Section 303

of Chapter IV of the California Civil Code, which enumerates that which may be regulated by corporate by-laws, states, *inter alia*, as follows:

"The by-laws of a corporation may make provisions not in conflict with law or its articles for:

.

"7. Special qualifications of persons who may be shareholders and reasonable restrictions upon the right to transfer or hypothecate shares."

Another assumption that appears in numerous contexts in respondent's brief is that certain allegations contained in their complaint must be taken as admitted because not denied by the answer (R. Br. 6, 11, 14, 15, 20, 69). The first one of these is the allegation that at the time respondent applied for System membership it was "in all respects qualified and eligible for membership" (R. 3). Another is the allegation that Condition No. 4 "is arbitrary, unreasonable, capricious, discriminatory," etc. (R. 5). Such allegations, we submit, are but the mere conclusions of the pleader and, therefore, have not been admitted. See *Isbrandtsen & Moller Co. v. United States*, 300 U. S. 139, 145; *Nortz v. United States*, 294 U. S. 317, 324-5; *Pennie v. Reis*, 132 U. S. 464, 470; *Rosenhan v. United States*, 131 F. 2d 932, 934 (C. C. A. 10), certiorari denied 318 U. S. 790; *Fletcher v. Jones*, 105 F. 2d 58, 60 (App. D. C.); *Lucking v. Delano*, 122 F. 2d 21, 27 (App. D. C.); *Putnam v. Ickes*, 78 F. 2d 223, 226 (App. D. C.) certiorari denied 296 U. S. 612; *Maçse v. Hermann*, 17 App. D. C. 52, 56, affirmed, 183 U. S. 572; *United States National Bank of La Grande v. Pole*, 2 F. Supp. 153, 158 (D. C. Oregon).

Under Point I respondent argues (R. Br. 26) that for the Court to uphold the validity of Condition No. 4 would be

to extend the limits of the Board's authority to impose conditions of membership relating to management to unreasonable or even absurd proportions. They argue that the Board should be restricted to considering only the *existing* "management" of an applying bank and should not have the power to consider the character or identity of its stockholders.

The answer to this contention is that the Board, having been charged with the duty of appraising each situation as it is presented, must necessarily have discretion to impose such conditions as appear necessary to meet each such situation. It follows that the validity of the conditions in each case must be determined in the light of the particular situation to which they are addressed.

Respondent contends that petitioners' argument that Condition No. 4 was related to the soundness of the Bank's management is insincere because when the majority below ruled that the Board might properly invoke the Condition *after* a showing that the Bank's management, policies or personnel had been deleteriously affected by the Transamerica acquisition, petitioners thereupon argued in this Court that the decision below emasculated the Condition and stripped it of its vitality (R. Br. 26-27).

The answer to this argument is that the Condition shows on its face that the Board had determined that the Transamerica management was unsound *at the time of the Bank's admission*. Hence, the Board was protecting the Bank and the System against the possibility of Transamerica's entry into the Bank's management at any time while that situation prevailed. To require that the Board await damaging results to the institution before it might properly invoke the Condition would, therefore, deprive the

Condition of its effectiveness as a preventive or prophylactic measure.

Respondent also attacks the validity of petitioners' argument that the Condition is related to the "convenience and needs of the community to be served by the Bank" (R. Br. 27). It challenges this argument on the ground, first, that as a part of its original application the Bank enclosed a copy of a communication from the Superintendent of Banks of the State of California which contained his finding that "the public convenience and advantage will be promoted by the establishment of a new bank in this location". The fact is, however, that the Commissioner's finding was coupled with the requirement that the new bank, before it might commence operations, should first obtain Federal deposit insurance (R. 35-36). His decision, therefore, was tantamount to saying that only if Federal insurance was granted (upon the terms set forth in the Federal Reserve Act, which requires the Board to consider "the convenience and needs of the community to be served by the Bank"), would the Bank be permitted to operate in the State.

Secondly, it is charged that petitioners' argument is an afterthought because no reference was made to "the convenience and needs of the community" in the Board's letter of March 11, 1942, which stated the circumstances under which the Board would agree to reconsider the Bank's application. While it is true that the precise words Convenience and Needs of the Community were not used, nevertheless Paragraph No. 5 of that letter expressly required a showing that "the bank was organized as a bona fide local independent institution" (R. 54). And the same statement

in substance appears in the Board's letter of May 6, 1942 (R. 60).

Respondent argues that the fact that the Board required the Bank formally to evidence its acceptance of the conditions of membership outlined in the Board's letter of May 6, 1942, "is cogent evidence that the Board did not believe that it could impose the Condition, relying solely on its own power, and make it effective" (R. Br. 44). This argument is utterly baseless, since the Board always requires applicants to accept any conditions it imposes. Here, as in any case where the Board admits a bank to membership, the requirement is intended merely to insure that all persons in authority in the Bank are fully aware of the conditions that have been imposed and are not permitting the Bank to enter System membership unaware of the responsibilities and requirements of that status.

Next, respondent argues that Condition No. 4 is contrary to the purpose stated in Section 12B(y) of the Act, which relates exclusively to the deposit insurance provisions of the law and provides in part as follows:

"It is not the purpose of this section to discriminate, in any manner, against State non-member, and in favor of national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section."

Upon the basis of this quotation respondent makes the novel argument that, as no power is conferred upon the Deposit Insurance Corporation to annex conditions in granting insurance, respondent is being discriminated against in being made subject to Condition No. 4 by the Board (R. Br. 45-46). The answer to this contention is twofold:

In the first place, respondent did not apply to the Deposit Insurance Corporation for insurance; it applied to the Board for admission to the Federal Reserve System and the Board has specific statutory power to impose conditions on member banks. In the second place, respondent's contention, if upheld, would have the effect of amending Section 9, by construction, so as to prevent the Board from imposing conditions of membership upon any applicant which is not an insured bank—a limitation which finds no support whatever in the plain wording of the statute.

Next, respondent urges that the Condition is inconsistent with various statutory provisions which show that bank holding companies have been recognized by Congress as legitimate forms of business enterprise and that there is no statutory prohibition against such companies owning stocks in member banks (R. Br. 46-48).

The answer here is that, in passing upon the "character of management" of an applying bank, the Board legitimately is concerned with eliminating all, whether holding company or individual, who might offer potential danger either to the bank itself or to the System. In this case the Board had determined that Transamerica was pursuing unsound policies and that these policies offered potential danger to both respondent and the Federal Reserve System. We may take it that if, at the time a bank seeks membership in the System, the Board ascertains that a particular *individual* is associated or about to become associated with the management of such institution and the Board had concluded that the presence of such an *individual* in the management of that bank represented a potential dangerous influence, the Board would be empowered to condition the bank's membership upon the re-

moval of that *individual* and upon his thereafter remaining outside the bank's management. We see no valid reason for distinguishing between corporations and individuals in this regard, particularly since the bank holding company is the more likely to undertake to supply the *entire* management of a particular bank and not merely a part of it as would be the case with an individual. Under respondent's argument the Board would be required to permit any holding company, no matter how unsound its policies, to participate in the management of a member bank upon the wholly untenable premise that Congress has not prohibited holding companies generally from owning stocks in member banks.

Next, respondent argues that Condition No. 4 "runs squarely counter to the provisions of Section 9(12) of the Act (12 U. S. C. § 330) which guarantees to State member banks the retention of their 'full charter and statutory rights.'" (R. Br. 48)

The complete answer to this argument is contained in the words of the statute immediately preceding those quoted by respondent. They read: "*Subject to the provisions of this Act and to the regulations of the board made pursuant thereto*, any bank becoming a member of the Federal Reserve System shall retain its full charter and statutory rights". (Italics ours) Obviously, a condition of membership imposed pursuant to the power conferred upon the Board by Section 9 of the Act is a "provision of this Act" or a "regulation" of the Board which might properly limit the full exercise of a member bank's charter powers. Indeed, the examples of membership conditions cited in our main brief (P. Br. 14-15) show a number of clear instances of the application of this principle.

Respondent also argues that Condition No. 4 is inconsistent with the provisions of Section 9(9) of the Act which allow a bank to withdraw voluntarily from System membership (R. Br. 50). Respondent argues that Condition No. 4 makes the "voluntary" right to withdraw a "compulsory" duty to withdraw. But no better example of a "voluntary" undertaking could be found, we submit, than that evidenced by respondent's action and that of all of its stockholders and directors in their representations made to the Board in 1942 for the purpose of securing respondent's admission to the System.

Respondent further argues that the Condition is inconsistent with certain other provisions of the Act which provide for the removal of officers and directors of member banks found guilty of "unsound and unsafe practices" or for the termination of Federal deposit insurance for the same reason (R. Br. 50-52). In considering this argument it should be borne in mind that the sections referred to in respondent's brief comprise but two of the alternative methods provided by statute for dealing with this general subject. There are at least two others—the power of the Board to expel a bank from membership (Section 9(8) of the Act), and its power to impose conditions of membership (Section 9(1) of the Act). The choice of alternatives is obviously a matter for the bank supervisory authorities to consider in the light of the circumstances of each particular case. It would seem clearly preferable, however, to adopt that alternative which would remove a potential cause of unsafe or unsound practices, especially where, as here, such potential cause can be foreseen.

Respondent's constitutional argument, which is contained in Point II of its brief (R. Br. 57-58), hardly merits reply.

It seems to be that, because Congress could not itself condition the admission of a member bank against the subsequent ownership of any of its shares by a *particular* company such as Transamerica, it may not lawfully delegate this authority to the Board.

It is sufficient in answer to this contention to point out that what Congress has done under Section 9 is merely to delegate to the Board the authority to make detailed determinations in applying a legislative policy to particular facts and circumstances—that is, to apply a general standard to a particular company. Here the Board had determined that if a *particular* holding company should acquire respondent's stock, an unsound situation might result which would be detrimental to the banking system which Congress had created. Clearly Congress had the authority to protect the System against such a result and one of the methods which it adopted as a means to that end was the entirely reasonable one of authorizing the Board to impose conditions of membership. As the Court said in *Yakus v. United States*, 321 U. S. 414, 424:

“The Constitution as a continuously operated character of Government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call

for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework."

Respectfully submitted,

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December 1947.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYM-
CZAK, JOHN K. MCKEE, ERNEST G. DRAPER AND
RUDOLPH M. EVANS, *Petitioners*

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION
to Petition for Writ of Certiorari to the United States Court
of Appeals for the District of Columbia.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 1414

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYM-
CZAK, JOHN K. MCKEE, ERNEST G. DRAPER AND
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BRIEF FOR THE RESPONDENT IN OPPOSITION
to Petition for Writ of Certiorari to the United States Court
of Appeals for the District of Columbia.

QUESTIONS PRESENTED.

The petitioners' statement of the questions presented is not accurate.

(1) Their statement of the first question is based upon a false premise. It reads:

"(1) Whether the Board exceeded its statutory authority in imposing a condition of membership 'pursuant' to Section 9 of the Federal Reserve Act."

So stated the question would answer itself; for if we should assume that the Condition was imposed "pursuant to the Federal Reserve Act" it would follow that the Condition is valid, since Section 9 of that Act (12 U.S.C. §321) provides, in part:

"The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a stockholder of such Federal reserve bank."

Actually, the main question considered and decided adversely to the petitioners by the court below was that which the petitioners here assume, without discussion, to be settled the other way, viz., was the Condition imposed "pursuant to the Federal Reserve Act"? The answer to that question may be found in the language of the Condition, or, if there be doubt as to the meaning of such language as written, then in the factual intent of the Board as shown by the undisputed surrounding circumstances described in this record.

Therefore if this court agrees, as we believe it must, that the language of the Condition is clear on its face and that neither that language nor the factual intent of the Board, as disclosed by the record and found by the court below, affords any basis for the petitioners' bald statement that the Condition was imposed "pursuant to the Act", then, a more accurate statement of the first question presented would be:

(1) Does the Board of Governors of the Federal Reserve System have an "administrative discretion" *beyond* the expressly restricted authority conferred by the Federal Reserve Act, to impose conditions of membership unauthorized by the Act? More specifically, does the Board of Governors have power to require an admittedly qualified and eligible member bank to forfeit its membership, with consequent destruction of its business and loss to all of its stockholders, as well as loss to the whole community of needed banking facilities, merely because of the acquisition of a small minority of its stock by a purchaser, which, without a hearing of any kind, has been proscribed by the Board?

The petitioners' second question is also inaccurate. There is no element of "estoppel" in this case. A more accurate statement of the second question would be:

(2) Assuming that the Board has acted without authority of law in imposing a condition of membership upon an admittedly eligible applicant state bank, is such bank nevertheless bound by such invalid condition if it agreed to it (there being no statutory provision for obtaining Federal Reserve membership by agreement)? Stated more broadly, may an administrative agency of the federal government effectively usurp power, which the Congress has deliberately withheld from it, by refusing to perform its own statutory functions except upon obtaining an unauthorized agreement from a citizen?

The petitioners' third question attacks the jurisdiction of the District Court upon the basis of two false premises: (1) that the Board had "neither acted nor threatened to act under the Condition" and (2) that the respondent had failed "to exhaust its administrative remedy." In view of the clearly supported findings below (1) that the Condition itself, as written, as well as the Board's subsequent resolution respecting it, constituted a continuing threat to the respondent and (2) that the respondent had no administrative remedy, question 3 falls of its own weight.

The petitioners might have added a fourth question, which bears directly upon the immediate problem as to whether this court should grant certiorari:

(4) May a governmental administrative agency after representing to a court in a judicial proceeding that its action which is under legal test is to be effective only within certain limits, in harmony with procedure prescribed by statute, and after so inducing the entry of a declaratory judgment fairly responsive to such contentions, obtain a review thereof by certiorari in an effort to widen the effective scope of its action?

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations are set out in the Statutory Appendix, *infra*, pp. A-1 to A-11.

ARGUMENT.**FACTUAL BACKGROUND.**

The complaint alleged (Pars. V, VII, R. 3-4); the answer necessarily admitted and the court below found (R. 121-122) that the Board of Governors of the Federal Reserve System, acting on the application of the Peoples Bank of Lakewood Village, California, for membership in the system, took into consideration all factors prescribed by statute, found the bank in all ways qualified and eligible for membership and then imposed the following condition (R. 59):

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

It will be noted that the key words in the Condition are: "If * * * Transamerica * * * acquires * * * any interest in such bank * * *." That is all that must happen before the petitioners can invoke a forfeiture at will.

The action was one for a declaratory judgment and the court below has held that the Condition, as it is written, is invalid, but that in the light of (a) concessions of lack of power to prevent a purchase of stock which would be violative of the Condition; (b) a resolution passed by the Board after suit was begun; and (c) the statements of its counsel in argument concerning the circumstances in which the Condition would be invoked and the methods which would be employed in its enforcement; the Condition may be given effect in the event of a change for the worse in some substantial way in the Bank's management policies or practices such as would justify the expulsion of any member bank from the Federal Reserve System, a hearing, however, being required. This declaration of the rights of the parties being in strict accord with the law as well as with the petitioners' own representation of their intent, it is most difficult to see about what they can complain. But they are now urging that they should be permitted to enforce the Condition as written (Petition, pp. 5, 14-15).

The facts surrounding the application by Peoples Bank for membership in the Federal Reserve System are well summarized in the opinion of the Court of Appeals (R. 121-125) and are supported by the record (R. 28-61).

After the Bank was completely ready for business and its application was made, five months elapsed before it received notice of its admission (R. 41, 58). It had no economic alternative but to open its doors

under the shadow of this unprecedented and, as the court below called it, "drastically restrictive" condition. The Bank also had every reason to expect at that time that if it should ever be given notice to withdraw from the Federal Reserve System by the invocation of the Condition, it would be able to obtain Federal deposit insurance by direct application as a non-member state bank (R. 31-32). During all the time the application was pending and in all the discussions and correspondence relating to it, the petitioners and their representatives carefully avoided disclosing to the Bank that they had already agreed with the Federal Deposit Insurance Corporation that the latter would refuse to insure it if it should "withdraw from the Federal Reserve System". That disclosure was first made in a letter from Mr. Eccles to Mr. A. P. Giannini, Chairman of the Board of Transamerica Corporation, on November 13, 1942 (R. 65, 82) and was not made known to the Bank until March 24, 1944, nearly two years after the original imposition of the Condition (R. 32, 107).

The Bank was wholly powerless to prevent its stockholders from selling stock to any person or corporation they saw fit, and they had not even been called upon to restrict their right to do so. No matter how much the Bank might have desired to avoid conflict with the petitioners concerning their anti-Transamerica "policy", the Bank realized for the first time on March 24, 1944, that if this Condition No. 4 meant what it said and was valid, the Bank's very existence might be terminated at any

time at the whim of the petitioners—all because Transamerica Corporation had bought 500 (out of a total of 5,000) of the outstanding shares of the Bank's stock (R. 6, 107). Accordingly, the Bank's Board of Directors promptly authorized the institution of legal proceedings to determine the legal effect of Condition No. 4 (R. 32).

The complaint alleges and the answer necessarily admits that termination of the plaintiff's membership in the Federal Reserve System would cause plaintiff to lose its status as an insured bank (It is expressly so provided by law. See Section 12B of the Federal Reserve Act, as amended, subsection (i) (2); 12 U.S.C. §264 (i) (2); Statutory Appendix, pp. A-6, A-7) and "such loss would render the plaintiff unable lawfully and advantageously to pursue its functions as a bank and to conduct its operations to the advantage of its stockholders and the public served by it under supervision according to law" (R. 5-6).

The documentary evidence annexed to the affidavits submitted by the plaintiff also shows the circumstances in which the petitioners' anti-Transamerica "policy" was developed. No pretense was made that it represented the Congressional intent. No claim was made that the petitioners had any legal right to prevent further investments in bank stock by Transamerica Corporation. Yet we have the bald admission by the petitioners and their representatives that they, in secret meeting with the Comptroller of the Currency and the Chairman of the Board of Directors of the Federal Deposit Insurance Corporation,

and not as a part of any administrative proceeding whatsoever, unanimously agreed that they should, "under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group" (R. 69-70), and that the Federal Deposit Insurance Corporation should decline "to insure any newly organized State non-member bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System" (R. 84). The petitioner Eccles, Mr. Leo T. Crowley, who was then Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and other spokesmen for the petitioners have admitted time and again in testimony before Congressional committees and in other public records that they do not under existing law possess any power to restrict the expansion of bank holding companies; and the Congress, thoroughly aware of the petitioners' desire for such power, has steadfastly refrained from enacting any legislation designed to confer it¹ (R. 67-68, 96-103).

¹This Court may take judicial notice of that which is a matter of public and common knowledge, viz., that the principal defendant, the petitioner Eccles, on almost the same day on which the petition herein was filed, appeared before a committee of the Congress and testified publicly in support of a bill now pending, which was sponsored by him for the express purpose of curbing the expansion of Transamerica Corporation. It is significant that the alleged need for the legislation is predicated by said petitioner (whose testimony was widely reported in newspapers

The imposition of Condition No. 4 was part and parcel of the Board's anti-Transamerica "policy". This is apparent not only from the wording of Condition No. 4, but from the circumstance that the letter from the Board of Governors denying the original Peoples Bank application for membership was written on the same day and signed by the same man as the letter to Transamerica Corporation announcing the adoption of the "policy" of declining permission to Transamerica, to acquire "any substantial interest" in banks (R. 63-64, 69-70). The correspondence annexed to the Andrews affidavit (R. 69-96) shows eloquently on its face the character of the prejudice in which Condition No. 4 and the entire anti-Transamerica "policy" were conceived. Yet all the while, it was conceded by the petitioners that the Congress, —the only body vested with a lawful right to declare such a policy—had turned a deaf ear to the pleas of the petitioners to pass a law authorizing the enforcement of their "policy".

From the foregoing, it is plain that Condition No. 4 was imposed pursuant to the policy of discrimination agreed upon by the Federal bank supervisory agencies and for the purpose of restricting the business of two corporations named in the Condition in the face of the admitted and unquestioned fact that the petitioners were without any authority in law to impose such a restriction.

throughout the country) upon an assumption of the correctness of the finding in the court below, that Condition No. 4 as written is invalid. (See p. 18, *infra*, for verbatim quotation from Mr. Eccles' testimony.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. THE CASE PRESENTS NO QUESTION OF IMPORTANCE FROM AN ADMINISTRATIVE VIEWPOINT.

The petitioners state that the case presents *for the first time* an important question concerning the statutory authority of the Board to condition the admission of banks to System membership. The record shows, without dispute, however, that no condition having any similarity to Condition No. 4 has ever been imposed upon any other bank seeking System membership (R. 62-63, 104-106). This means that in the 30 year history of the Federal Reserve System there has been no instance in which the power sought in this case was exercised with respect to any other bank. That fact bears directly upon the question of the importance of review and is a strong indication that the decision of this court is not required from a practical standpoint to resolve any question of either doubtful or important administrative authority.

. That the Condition is one of no administrative importance to the petitioners is further shown by their studious attempts throughout this litigation to avoid any decision involving an interpretation of the statute by interposing procedural motions which sought the avoidance of any determination on the merits.

2. THE CASE PRESENTS NO QUESTION OF IMPORTANCE FROM THE VIEWPOINT OF INTERPRETATION OF FEDERAL STATUTES.

(a) The petitioners have admitted lack of authority under existing law to curb extension of bank holding company interests.

A mere reading of the Condition shows that the purpose of the Condition was to prevent one bank or the owners of one group of banks from acquiring any interest in the plaintiff bank, and that this purpose was to be made effective through denying to the plaintiff a continuation of the advantages of memberships in two Federal agencies, namely, the Federal Reserve System and the Federal Deposit Insurance Corporation. The record (R. 96, 97, 100) shows that the petitioners have admitted lack of authority under existing law so to curb such acquisitions. Two brief extracts are repeated here:

From Thirtieth Annual Report of the Board of Governors (Exh. 24, R. 96):

“* * * the only limitation which the law imposes upon the control of subsidiary banks by bank holding companies is that the latter may not vote their stock in a controlled bank without securing a voting permit from the Board, and it is only as an incident to obtaining the voting permit that there is any regulation at all. * * *”

“There is now no effective control over the expansion of bank holding companies either in banking or in any other field in which they may choose to expand. * * *”

From Eccles' testimony before the Committee on Banking and Currency, April 5, 1943 (Exh. 25, R. 98):

"Mr. Patman: Do not you have some power and authority to deal with that situation?

"Mr. Eccles: We do not.

"Mr. Patman: Have you ever asked for any?

"Mr. Eccles: No we have not. * * *

(b) The Board has long understood that its power to impose conditions of membership on state banks was confined to its powers under the Federal Reserve Act.

The sole source of authority in the Board to impose any conditions upon the acquisition by an applicant state bank of stock in a reserve bank is found in the following excerpt from 12 U.S.C. §321 (Section 9 of the Federal Reserve Act, Petition p. 20):

"* * * The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe *pursuant thereto* may permit the applying bank to become a stockholder in such Federal reserve bank." (Italicized words added by amendment.)

The Congressional intent that the Board should not have authority to roam at large in the prescription of conditions has been made very clear. As §321 was worded prior to amendment in 1927 (McFadden Act), it provided, in broad language, as follows (40 Stat. 233):

"The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the apply-

ing bank to become a stockholder." (Public Law No. 25, Sixty-fifth Congress, approved June 21, 1917.)

Since the McFadden Act inserted the words "pursuant thereto" in February, 1927, there has been no doubt at all that the Board's power to impose conditions of membership on state banks has been limited to such conditions as would be imposed pursuant to the Federal Reserve Act. Petitioners tacitly admit this (Petition, p. 7, par. (a)). The effect of the McFadden Act so to confine conditions of membership is stated in the Board's official report to the Congress of the United States for that year. (See quotation in Note 2 below.)

(c) Condition No. 4 does not relate to the bank's qualifications for membership at the time of the application, nor does a subsequent breach of the condition work a legal defeasance of membership.

The record (R. 4) shows that plaintiff bank was found eligible by the Board and admitted to membership; it also shows that the Board still regards it as eligible (R. 11).

There was no question as to the general character of the bank's management, as to its capital structure, its prospects for success, the convenience and needs of the

²Page 43, Annual Report of Federal Reserve Board for 1927:

"Conditions of membership which may be imposed on State member banks.—The first paragraph of section 9 of the Federal reserve act was amended by the McFadden Act so as to require that the conditions imposed by the Federal Reserve Board upon State banks admitted to membership in the Federal reserve system shall be pursuant to the Federal reserve act."

community or as to its purpose to conduct a legitimate banking business. It met every legal test of eligibility. Affirmative findings on these factors resulted in the admission of the bank to the System. Thereafter it was incumbent on the bank to conduct its operations in accordance with all regulations and according to law and to avoid unsafe and unsound practices in the transaction of its banking business. The statutes on this subject are clear and unambiguous. For the failure of the bank to conduct its business according to law its officers may be penalized (Section 30, Banking Act of 1933, 12 U.S.C. §77, Statutory App. pp. A-1, A-2); for continuation of unsafe and unsound practices the bank's insurance may be terminated, which will result in the termination also of its membership in the Federal Reserve System (Federal Reserve Act, §12B, subsection (i)(2), Statutory App. pp. A-6, A-7), and for failure to comply with regulations made pursuant to Section 9 of the Federal Reserve Act the bank's membership is subject to forfeiture under paragraph 8 of Section 9 of the Act, as amended (12 U.S.C. §327, Petition p. 21, Statutory App. p. A-3). If the bank knowingly or negligently permits its officers to violate provisions of law or regulations its insurance can be terminated (Fed. Res. Act §12B (i)(1); 12 U.S.C. §264 (i)(1); Statutory App. pp. A-4, A-5); but if the officers alone are involved, it is the statutory policy to remove them rather than to remove the bank from the System (12 U.S.C. §77, Statutory App. pp. A-1, A-2). There is no statute under which the membership of a presently qualified and eligible bank may be so conditioned

against future contingencies as to involve the bank in penalties different from and inconsistent with those expressed in the statutes. On the other hand, the Federal Reserve Act affirmatively and expressly recognizes that all banks shall be permitted to "obtain and enjoy" the benefits of deposit insurance without discrimination (Sec. 12B (y)(2); 12 U.S.C. §264 (y); Statutory Appendix p. A-3), from which it follows that a state bank cannot be expelled and thereby lose the benefit of insurance upon a ground that is not equally applicable to national banks. For obvious reasons the membership of a national bank could not be so conditioned. A condition prescribing such a forfeiture for a state bank is therefore not imposed pursuant to the act, but contrary to it.

The Court of Appeals in that part of its opinion beginning at the middle of page 128 of the record, and more specifically at the middle of page 129, basing its discussion on contentions and actions of the Board with respect to the operation of the Condition, goes to some length to harmonize the legal effect of what it deems to be the administrative interpretation of the Condition by the Board with the disciplinary statutes, thus giving to it all the effect that can be ascribed legally, while making clear that it cannot be legally operative throughout the scope of its broad declaration. The effect of the decision, therefore, is to leave the Board free to exercise with respect to the plaintiff bank all of its statutory disciplinary powers.

Clearly, if the Condition were interpreted as giving the Board the power to compel the withdrawal of

Peoples Bank from the Federal Reserve System merely because of the acquisition of stock (even one share) by Transamerica Corporation, the Condition would be invalid as being in excess of the powers delegated to the Board by the statute.

It is a well established principle that where an administrative agency has exceeded the powers given to it by law, such action will be restrained by the courts. As this Court said in *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129, at p. 134:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 320-322; *Miller v. United States*, 294 U. S. 435, 439-440, and cases cited."

See also:

Waite v. Macy, 246 U. S. 606;

Morrill v. Jones, 106 U. S. 466;

International Railway Co. v. Davidson, 257 U. S. 506;

Campbell v. Galeno Chemical Co., 281 U. S. 599;

The State of Colorado v. Toll, 268 U. S. 228;

Miller v. U. S., 294 U. S. 435;

Vom Baur, Federal Administrative Law (1942 Ed.), Vol. 1, §499;

Lynch v. Tilden Produce Co., 265 U. S. 315;

Koshland v. Helvering, 298 U. S. 441.

(d) The subject matter of this condition is currently a matter of legislative consideration under formal recommendations of the Board pointing to the inadequacy of the existing law to achieve the Board's objectives, and is not as yet crystallized in legislative enactment. (See S. 829, 80th Congress, First Session, and reports of current hearings thereon.) This may well result in a decision which would be of little or no value under new legislation. In a statement of Chairman Eccles before the Senate Banking and Currency Committee on S. 829, made and released on May 26, 1947 and which was published at large on the following day (see page C 37, New York Times for Tuesday, May 27, 1947) is the following, quoted verbatim:

"In order to establish branches, national banks must first obtain permission from the Comptroller of the Currency, State member banks from the Board and non-member insured banks from the FDIC. But the bank holding company is not subject to any such requirements. If a bank in its group is denied the right to establish an additional office, *there is nothing to prevent it from acquiring the stock of an existing bank and simply adding the institution to its list of controlled banks, operating it, for all practical purposes, as a branch of the entire system.*" (Italics ours.)

The bill has been favorably reported to the Senate.

3. ADDITIONAL REASONS ADVANCED BY PETITIONERS STATE NO GROUNDS FOR REVIEW.

The suggestion advanced by the petitioners as to other valid purposes for the Board's action in imposing the Condition (Petition, p. 10) which are grounded upon a reference to the Clayton Act can impart no validity to the Condition nor supply any reason for review, for:

(a) Administrative proceedings for the enforcement of the Clayton Act are specifically prescribed in that act (15 U.S.C. §21, Statutory App. pp. A-8 to A-11) and the method of administrative enforcement is entirely foreign to that prescribed for the enforcement of valid conditions under the Federal Reserve Act.

(b) The Condition itself is more comprehensive and restrictive than compliance with the Clayton Act requires for the Condition would apply even to a purchase of a few shares as an investment (expressly excepted under 15 U.S.C. §18, Statutory App. A-7, A-8).

(c) The enforcement of the Clayton Act requires a cease and desist order enforceable only in the Court of Appeals (15 U. S. C. §21, *supra*); that act carries its own penalties and does not authorize expulsion of a bank from the Federal Reserve System for an offense committed by some other person.

(d) Even if it were conceded *arguendo* that the principle or policy of the Clayton Act is impliedly involved in the Condition, it would follow as a nec-

essary legal conclusion that the Condition is invalid because it is not imposed "pursuant" to the Federal Reserve Act but pursuant to a different statute and involves acts ~~entailing discipline~~ altogether different from that applicable to breaches of conditions of membership. Membership is forfeited under Paragraph 8 of Section 9 of the Federal Reserve Act (12 U. S. C. §327, Petition, p. 21) only for non-compliance with the provisions of that "section" or the regulations made pursuant to it. *Besides, whatever jurisdiction the Board has to enforce the Clayton Act exists irrespective of the Reserve Act or of this Condition and is equally applicable to all banks or companies affected, regardless of any prior stipulations, conditions or agreements and it is not affected by the judgment in this case.*

4. THE SECOND AND THIRD QUESTIONS PRESENTED BY PETITIONERS STATE NO GROUNDS FOR REVIEW.

(a) The second question presented by the petitioners is whether the respondent is "estopped" from challenging the validity of the Condition.

No reasons are presented in the petition which point to the appropriateness of a review by this Court of that part of the decision of the Court of Appeals holding that the doctrine of estoppel is not applicable. This question is apparently but incidental to the first and principal question. The court below pointed out that the respondent is not attacking the validity of any statute and said (R. 131):

"No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it."

Obviously, any other conclusion would operate practically to expand the powers of the regulatory body beyond those which are conferred by law. Any regulated corporation such as a bank is entitled to the advantages of membership in federally established and administered agencies on terms of equality with every other corporation. Any attempt to bind any individual corporation through the imposition of unauthorized conditions on the theory that their acceptance will estop the corporation to question them would bring about inequalities which the statutes are designed to prevent. In addition; estoppels result from equitable considerations and equity naturally frowns on inequality.

There is nothing in the decision of the Court of Appeals touching the doctrine of estoppel which warrants review within the principles generally understood to control in the granting of writs of certiorari.

(b) The third question presented is whether the District Court had jurisdiction to entertain an action for declaratory judgment in advance of any steps

being taken by the Board actually to enforce the Condition.

The negative response to this question desired by the petitioners would destroy any real usefulness of the remedy of declaratory judgment. The exact question was thoroughly considered upon a separate motion made before the Honorable Alexander Holtzoff of the District Court of the District of Columbia seeking dismissal for lack of a justiciable controversy. The contention was fully argued and briefs were submitted by both parties. Thereafter Justice Holtzoff, in an exhaustive and carefully considered opinion reported in 64 F. Supp. 811, denied the motion. The majority opinion in the Court of Appeals stated on this point: "We need not elaborate upon the opinion of the learned justice of the District Court * * *".

The authorities bearing upon the question were carefully analyzed and considered in Justice Holtzoff's opinion. The philosophy of the opinion is perhaps best reflected in the quotations which were made from the opinion of Mr. Justice Douglas in *Altwater v. Freeman*, 319 U. S. 359, 365, to the effect that "It was the function of the Declaratory Judgments Act to afford relief against such peril and insecurity." Justice Holtzoff concluded (64 F. Supp. at p. 816): "To say that no actual controversy exists between the parties is not realistic."

It is doubtful that any opinion has been written dealing with the single question of the existence of a justiciable controversy in an action for declaratory judgment that reflects more sound reasoning and that

reaches a conclusion more in accord with the language and spirit of the statute. Certainly the petitioners have presented no ground for the granting of certiorari to reverse the decision of Justice Holtzoff under the facts presented on this record, and it is inconceivable that the petition would be granted for the purpose of effecting such a review.

5. THERE EXISTS NO "ADMINISTRATIVE REMEDY".

Under the third question presented by the petitioners it seems to be contended,—a claim made in this Court for the first time in this case—that the action was premature because of the so-called failure of the respondent "to exhaust its administrative remedy." It seems to the respondent, as it evidently appeared to Justice Holtzoff, that the Condition was so drawn that there exists no administrative remedy. Under the Condition the only question remaining for determination by the Board is whether or not Transamerica Corporation purchased shares in the respondent bank without the prior approval of the Board. This fact is alleged in the complaint. It is not denied and it is, of course, conceded. The only possible administrative remedy if the Condition be invalid is an application to the Board for its cancellation. The record (R. 7) shows that this application was made before this proceeding was begun and that the petitioners had failed to comply with the respondent's request. Since the undisputed facts then show that the Board insists upon retaining a claimed right sum-

marily to terminate the membership of respondent bank, wholly aside from any question of the legality of its operations and its stability or soundness, the question of administrative remedy is not in the case.

SUMMARY AND CONCLUSION.

There is nothing in the decision below which warrants review by this Court. A drastically restrictive and unique condition of Federal Reserve membership has been imposed upon a small California bank. No other bank anywhere has ever been subjected to such a restriction. The bank in question, after seeking administrative relief in vain, has been forced to the trouble and expense of coming to the District of Columbia to sue. The administrative agency in its effort to defeat the suit has represented to the Court below that its intention, if not its words, was to act only within the limits permitted by the statute. The Court below, relying upon the good faith of the agency, has not given injunctive relief, but, as a minimum protection to the bank, has declared the rights of the parties in accordance with the statute and in conformity with other decisions of this Court, —a declaration wholly consistent with the agency's representation of its intention. That result is satisfactory to the bank. The agency, simultaneously with its petition to this Court to review that decision, has also asked the Congress to give it a new legislative grant of authority which both the agency and the Court below have said it does not now have. If the

Congress should grant the authority requested, this case would immediately become moot. In such circumstances it is difficult to see what useful purpose would be served by granting certiorari.

THE PETITION SHOULD BE DENIED.

Dated, June 30, 1947.

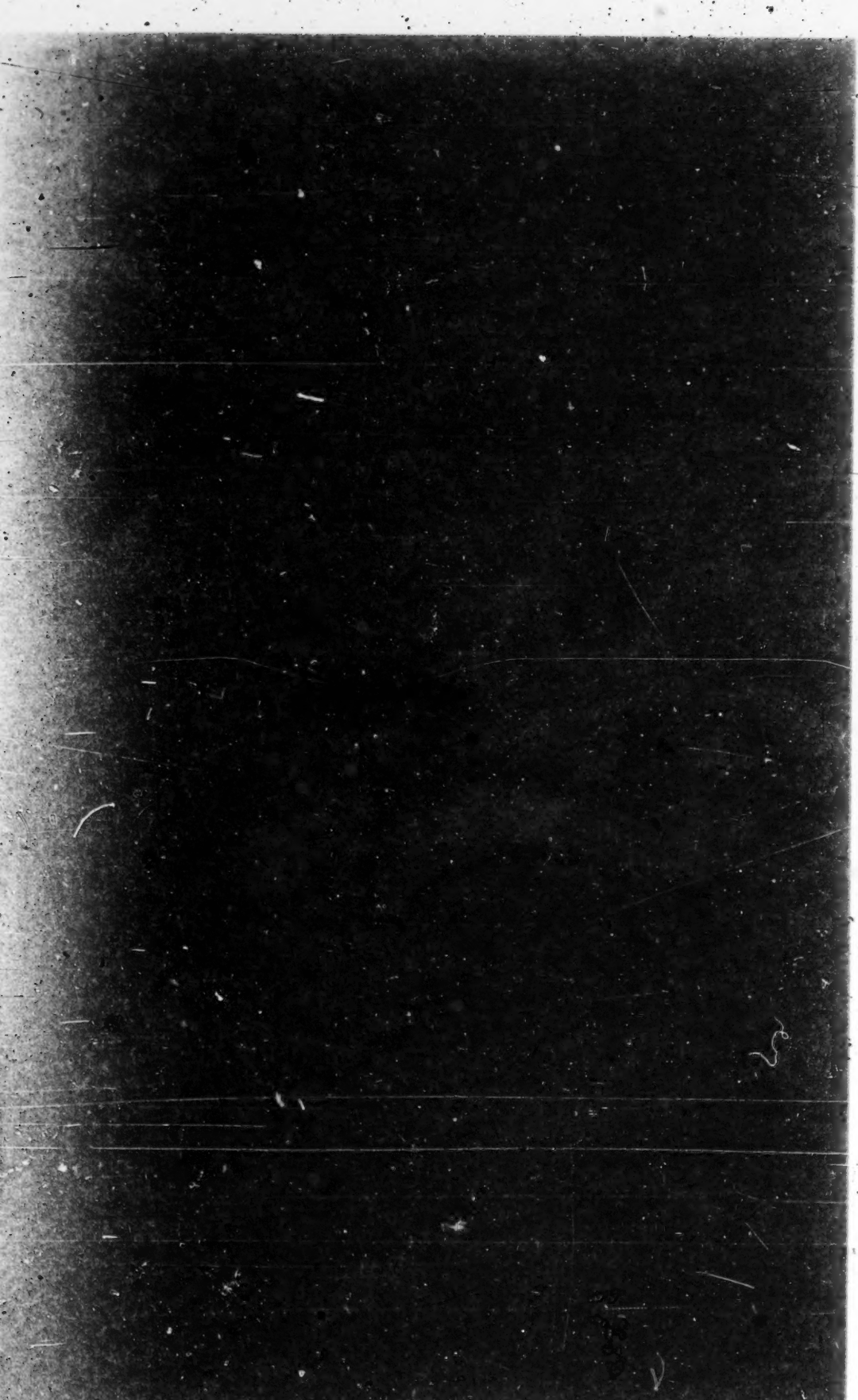
Respectfully submitted,

SAMUEL B. STEWART, JR.,

LUTHER E. BIRDZELL,

Attorneys for Respondent.

(Appendix Follows.)



Statutory Appendix

Excerpts from Banking Act of 1933 relating to penalties for "Unsafe or Unsound Practices" in business of a State Member Bank.

(As set forth in United States Code, Title 12.)

12 U.S.C. §77. Removal of director or officer.

"Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal

Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than five years, or both, in the discretion of the Court. June 16, 1933, c. 89, §30, 48 Stat. 193; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

Excerpts from Federal Deposit Insurance Provisions of Federal Reserve Act.

(As set forth in United States Code, Title 12.)

12 U.S.C. §264. Federal Deposit Insurance Corporation—Creation; duties.

* * * * *

“(y) It is not the purpose of this section to discriminate, in any manner, against State nonmember, and in favor of, national or member banks; but *the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section.* No bank shall be discriminated against because its capital stock is less than the amount required for eligibility for admission into the Federal Reserve System.” (Italics ours).

Federal Reserve Act, Sec. 9, par. 8.—Forfeiture of Membership.
(United States Code, Title 12, §327.)

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the Board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Federal Reserve Act, Sec. 12B, subsection (i).—(Federal Deposit Insurance Provisions.) (United States Code, Title 12, §264(i).)

(1) (1). Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days' written notice to the Corporation, and to the Reconstruction Finance Corporation if it owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. *Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof.* Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an

insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. *If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention.* The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination

shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

(2) *Whenever the insured status of a State member bank shall be terminated by action of the board of directors, the Board of Governors of the Federal Reserve System shall terminate its membership in the Federal Reserve System in accordance with the provisions of section 9 of this Act, and whenever the insured status of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation whenever the bank shall be unable to meet the demands of its depositors. Whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured bank shall, without notice or other action by the board of directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System, with like effect as if its insured status had been terminated on*

said date by the board of directors after proceedings under paragraph (1) of this subsection. (Italics ours.)

* * * * *

Excerpts from Clayton Act.

(As set forth in United States Code, Title 15.)

§ 18. Acquisition by one corporation of stock of another.

No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about,

or in attempting to bring about, the substantial lessening of competition.

* * * * *

§21. Enforcement provisions; procedure.

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is hereby vested. In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; *in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies*; and in the Federal Trade Commission, where applicable to all other character of commerce, *to be exercised as follows*:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of said sections, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or

board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order *requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title*, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is

being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such

additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in sections 346 and 347 of Title 28.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust laws. (*Italics ours.*)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST G. DRAPER and RUDOLPH
M. EVANS, PETITIONERS,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.

RESPONDENT'S BRIEF.

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IN THE
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OCTOBER TERM, 1947.

No. 101.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST G. DRAPER and RUDOLPH
M. EVANS, PETITIONERS,

v..

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.

RESPONDENT'S BRIEF.

QUESTIONS PRESENTED.

The petitioners' statement of the questions presented, although altered from those presented in their petition for certiorari, is still not accurate. There is one, and only one, question of substantive importance presented by this case. It may be more accurately stated as follows:

(1) Did the Board¹ exceed its statutory authority in requiring the System membership of an admittedly qualified and eligible bank to be subject to forfeiture, upon notice from the Board, in the event of the acquisition (which the Bank was powerless to prevent) of "any interest", however small, in its stock by a purchaser, which, without a hearing of any kind, has been proscribed by the Board?

There is no element of either estoppel or prematurity in this case. A more accurate statement of the second and third questions would be:

(2) Assuming that the Board has acted without authority of law in imposing a condition of membership upon an admittedly eligible applicant state bank, is such bank nevertheless bound by such invalid condition if it agreed to it (there being no statutory provision for obtaining Federal Reserve membership by agreement)?

(3) Did the District Court have jurisdiction to entertain a declaratory judgment action attacking the validity of a condition which, by its terms, constituted a continuing threat to the respondent's right to continue the exercise of its corporate functions, the Board having refused after demand to cancel the condition or remove the threat?

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Appendix (*infra*, pp. A-1 to A-12).

¹ In the interest of brevity, this brief will sometimes refer to the Board of Governors of the Federal Reserve System as "the Board", to the respondent Peoples Bank as "the Bank", to the Federal Reserve System as "the System", and to the Federal Reserve Act as "the Act".

STATEMENT.

The purported official act that gives rise to this controversy is the imposition by the Board upon the Bank of the following as a condition of membership in the System (R. 59):

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, *acquires*, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock or in any other manner, *any interest in such bank*, other than such as may arise out of usual correspondent bank relationships, such *bank*, within 60 days after written notice from the Board of Governors of the Federal Reserve System, *shall withdraw* from membership in the Federal Reserve System."

The emphasized words² make it apparent that the petitioners' statement of the first and principal question (Pet. Br. p. 2) is not only inaccurate but misleading. The Board did not condition "respondent's admission to the Federal Reserve System upon the maintaining of its independence of Transamerica Corporation". It conditioned the membership on the bank's withdrawal on notice from the Board if Transamerica should acquire "any interest in such bank" without the Board's permission. It is now argued by the petitioners that the whole of Condition No. 4 must be construed literally and the bank can be expelled at the Board's option if *any stock interest* is acquired

² All emphasis in this brief is ours unless otherwise indicated.

without its permission. A more accurate statement of the question, therefore, is as stated above in this brief.

The complaint alleges (par. XI, R. 6), and the answer necessarily admits, that Transamerica Corporation has completed the act which, according to the condition, *but not according to the Act* (§ 9(8); 12 U. S. C. § 327)³, works a forfeiture of the plaintiff's membership in the System. This proceeding is brought to determine whether that constitutes a legal ground of forfeiture. Plaintiff seeks a declaratory judgment which will remove the continuing threat to which it is now subject.

In view of petitioners' misinterpretation of the main issue in the case, it is not strange that their statement of facts (Pet. Br. pp. 2-8), as well as their discussion of applicable statutes (Pet. Br. pp. 12-29), is also over-simplified, superficial and incomplete. There are at least three important groups of facts which have been entirely overlooked or avoided in the petitioners' discussion:

1. The most unique oppressive characteristics of Condition No. 4 are that, unlike any condition prescribed in the Board's regulations (Pet. Br. p. 5, fn.2), and, unlike any other condition heretofore imposed by the Board and regarded by counsel as sufficiently analogous to be called to this Court's attention (Pet. Br. pp. 14-15, fn.5), Condition No. 4 neither forbids nor requires Peoples Bank to do anything relating to its assets or liabilities, the nature of its business or policies, the character of its operations or management. Indeed, there is nothing the respondent

³Appendix, p. A-2.

bank *can* do "to comply" with the Condition except "withdraw from membership in the Federal Reserve System". Petitioners' most bitter criticism of the Court of Appeals opinion is directed at that Court's interpretation of Condition No. 4 and the related subsequent resolution of the Board as contemplating a hearing, in advance of expulsion, as to whether "Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits, or in any other substantial way". According to petitioners, the requirement of *such* a hearing and determination, in advance of expulsion, would "emasculate the Condition * * * thus stripping the Condition of its vitality" (Pet. Br. p. 30). Counsel reiterate the Board's intent that it should be "empowered * * * to take action if Transamerica acquired 'any interest' in respondent" (Pet. Br. p. 32). Counsel now admit unmistakably, if subtly, that the only subject of inquiry at a hearing before the Board would be whether respondent "has failed to comply with the provisions" of Condition No. 4, i.e., whether respondent has withdrawn.

Petitioners have mistakenly assumed that if they can establish any connection between the contingency upon which the condition is hinged and the well being of the respondent Bank or the public interest, they have established their power to prescribe it. However effective this assumption may be as a means of distracting attention from the true character of the condition, the administrative history of conditioning membership and the basic statutory authority, it leaves unanswered every fundamental question involved. Such an assumption obviously proves too much. It would justify with

even greater plausibility conditioning membership on crop failure, depression, credit expansion, inflation or any other of the numerous causes of banking difficulties which are sources of concern to the Federal Reserve System. It would even justify what the Board really appears to want: a condition without regard to law, without regard to published regulations, without regard to the character of a member bank's personnel, its banking policies, or the safety of its deposits,—a condition which will replace all existing forms of conditions, viz., "the bank shall withdraw, on sixty days' notice". That is the effect of the decision petitioners are seeking from this Court.

2. The Condition does not relate to any fact in existence, or capable of being changed at the time of the bank's admission to membership. The complaint alleged (pars. V, VII, VIII, R. 3-4), the answer necessarily admitted and the court below found (R. 121-123) that the Board, acting on the application of Peoples Bank for membership in the System, took into consideration all factors prescribed by statute, found the bank in all ways qualified and eligible for membership and *then* imposed the condition in question.

The condition starts by describing as a contingent event a transaction between third parties, consummated without the prior written consent of the Board. It is not assumed in the condition that the Bank itself will have any power either to permit or prevent such a transaction, but it is clearly implied that the Board will have power either to permit or decline to permit it. Further, it is seen that the transaction relates to a matter that will not affect any business the Bank is authorized to transact, nor its assets or liabilities. It

would not be reflected in the Bank's balance sheet at all. This is doubtless the reason it is worded differently from all of the five allegedly similar conditions which the Solicitor General has described to the Court (Pet. Br. pp. 14-15, fn. 5) as supplied to him by the Board. Each of the cited conditions pertained to a matter *within the power of the bank to control*. The obligation, therefore, was placed on the bank in each instance to make the required adjustment.

For the condition in question to have been analogous to those cited by the Solicitor General it would have followed the pattern of the three stereotyped conditions stated in the Board's regulation (Pet. Br. p. 5, fn. 2), and in the extraordinary ones cited by the Solicitor General. It would have said in substance: "*The bank shall not permit, without the prior written approval of the Board of Governors of the Federal Reserve System, the acquisition by Transamerica Corporation of any interest in such bank.*" So worded, however, the condition would have immediately challenged attention to the Bank's lack of power with respect to such a transaction. It would have stated or directly implied a legal impossibility. Therefore, avoiding the appearance of a legal monstrosity and in order that the condition would appear to be vitalized it became necessary to add an appendage which would relate the condition to something *the Bank* would have power to do or not to do. So a second element was added. In the event of the happening of the proscribed and uncontrollable contingency, says the Board, "such bank, * * * shall withdraw from membership in the Federal Reserve System" at the Board's option.

Withdrawal, since 1917, has been within the power of every state bank "desiring to withdraw". *This is the only part* of the condition the breach of which can be charged to the Bank. But it is also merely the statement in substance of the procedure for terminating membership for non-compliance with any true condition. This provision stamps Condition No. 4 as most unique. The reason for adding it here becomes most obvious when we observe the Board's general regulation. It provides as follows:

"Every *State bank* while a member of the Federal Reserve System— * * *

(c) *Shall comply* at all times with any and all conditions of membership prescribed by the Board in connection with the admission of such bank to membership in the Federal Reserve System." (Code of Federal Regulations, Title 12, Chap. II, Sec. 208.7.)

A "condition" is a requirement exacted of *the bank*. That is what the law says and that is what the Board's regulation says. There can be no question about it. The statute governing membership forfeiture (Act § 9 (E); 12 U.S.C. § 327)⁴ authorizes the Board, after hearing, to forfeit the membership of a state bank if such "*bank has failed to comply with the provisions of this section (§ 9; 12 U.S.C. §§ 321-338) or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto.*"

Surely it is perfectly clear that this condition is so worded that its breach by the Bank does not involve the failure to comply with any provision of Section 9 and that the *only* failure of the Bank to "comply"

⁴Appendix, p. A-2.

with a regulation of the Board would consist in its failure to withdraw upon notice. *No other violation could be charged.*

That part of this condition addressed to third parties and concerned with their business is only the statement of a contingency. Conditions of membership must be addressed to the bank and relate to its affairs. That part of the condition relating to withdrawal is addressed to the Bank, but it is activated only by the volition of the Board which, the petitioners claim, need not be related to nor prompted by the Bank's condition or management. It is a mere statement of a substitute for the prescribed expulsion procedure and is made possible only by the 1917 amendment respecting voluntary withdrawal (Act § 9(9); 12 U.S.C. § 328).⁵

The 1917 amendment was made on the recommendation of the Board to encourage membership, but the petitioners' present argument is that Congress thereby enlarged the Board's authority to attach conditions of membership. If their position in this case should be upheld it would mean that the Board, by the simple device of attaching a withdrawal clause, could expel any bank without regard to its condition or management, just as it claims the right to expel the respondent in this case.

We submit that the clause is not a condition of membership at all, but an unauthorized procedure for expulsion. Of course, if the Bank should voluntarily withdraw, that would be the end of the matter. The real question is whether the Board could expel the

⁵Appendix, p. A-3.

Bank if, having no desire to do so, it should not withdraw.

3. While, in our view, Condition No. 4 is unlawful on its face regardless of its purpose, its illegality in purpose, as well as in effect, is emphasized by the undisputed factual background and circumstances leading up to the imposition of the Condition and the clear contrast between the apparent ulterior purpose of the Condition and the Congressional intent declared in the applicable statutes. The Board's long-standing and openly expressed antagonism to Transamerica Corporation, the complaints of Board members to Congressional committees respecting its lack of power to prevent Transamerica's growth, its secret agreement with other bank regulatory agencies as to a "policy" of discrimination against Transamerica and banks in the shares of which Transamerica might invest, and its simultaneous use of an application by this respondent (the smallest bank in Los Angeles County) as an innocent and unsuspecting vehicle through which to give expression to this secretly determined anti-Transamerica policy, all help to highlight the true meaning, basis and effect of Condition No. 4. Since that factual background has been almost completely ignored in petitioners' brief, we summarize it briefly here. These facts are undisputed in the record (R. 33-61).

The organization of the respondent bank was begun in the fall of the year 1941. The California Superintendent of Banks made an investigation which satisfied him that the public convenience and advantage would be promoted by the establishment of a new bank in the proposed location. He granted the requisite permission, stating, however, that his commitment was

"based on the condition that you will have obtained Federal Deposit Insurance which shall be effective concurrently with your opening for business" (R. 35-36).

There were two ways prescribed by law for a state bank to obtain Federal Deposit Insurance: (1) by direct application to the Federal Deposit Insurance Corporation; and (2) by an application for membership in the Federal Reserve System, which, under the law, automatically carried with it Federal Deposit Insurance.⁵⁴ The organizers of the respondent bank chose membership in the Federal Reserve System.

By November 28, 1941, when respondent's original application for membership was filed, the bank was already incorporated, had its capital raised, its location rented, its stationery printed, was in process of being equipped, and the parties interested expressed themselves as "very, very anxious for the bank to open at the earliest possible date, in order to take advantage of, amongst other things, the transfer of savings funds and holiday deposits which are certain to be available" (R. 41). Nothing was heard from the petitioners, however, until February, 1942.

The complaint alleges (par. V, R. 3) and the answer necessarily admits that in November, 1941, when its application for membership was submitted, the Bank was in all respects qualified and eligible for membership in the System, and that its application for such membership was made pursuant to the prescribed rules and regulations. The Bank's eligibility otherwise appears from the very fact that it was admitted

⁵⁴Act § 12B(e)(f), 12 U.S.C. § 264(e)(f); Appendix, pp. A-6 to A-8.

to membership subject to no condition whatsoever relating to the perfecting of its eligibility.

Notwithstanding the Bank's eligibility, a letter was written on behalf of the Board, under date of February 14, 1942, advising that the Board "is unwilling to approve the application on the basis of the information now before it" (R. 49).

This cryptic denial was personally investigated in Washington by Mr. John S. Griffith, a shareholder and director of the Bank, and his affidavit (R. 61-62) sets forth the substance of his conversation there with two members and the Secretary of the Board. Mr. Griffith was there informed:

"that upon assurances that the Peoples Bank was independent of Bank of America and Transamerica Corporation the Board might be disposed to reconsider the application" (R. 62).

Although it is admitted (Pet. Br. pp. 3-4) that the Bank and all of its stockholders complied with all requirements of the Board in connection with such reconsideration (R. 53-58), an examination of the letter which the Board required each stockholder to sign (R. 58) reveals that the stockholders *did not consent* to the imposition of Condition No. 4 and, indeed, that they were not requested to consent. Each of them simply signed a letter reading as follows:

"I, the undersigned, being a stockholder of the Peoples Bank, Lakewood Village, California, do hereby state that I have no arrangements, expressed or implied, with respect to the sale or transfer of the stock of the Bank which I own to either the Transamerica Corporation, or any other Bank Holding Company group, and that I do not intend to enter into any such agreements or understandings" (R. 58).

There is not the slightest suggestion in this record that the representations of fact and of present intention so made by the Bank's stockholders were inaccurate in any respect.

The Board of Governors then approved the application for membership by a letter dated May 6, 1942 (Complaint, par. VI; R. 4, 58-61). It was then, for the first time, that the Board stated its requirement of Condition No. 4 (R. 59).

It will be remembered that five months had elapsed since the bank was completely ready to open for business and "very, very anxious" to do so. It had no economic alternative at that time but to open its doors under the shadow of this unprecedented restriction, which it will be noted is much broader than the commitment of the shareholders, and hope that no occasion would arise in which the Board could invoke it. It also had every reason to expect, at the time when the condition was accepted, that if it should ever be given notice to withdraw from the System by the invocation of Condition No. 4, it would at least be able to obtain Federal Deposit Insurance by a direct application as a non-member state bank, and would not be wholly prevented from pursuing its chartered purposes (R. 31-32). It will be noted that the petitioners and their representatives carefully avoided disclosing to the Bank in these prolonged negotiations that they had already agreed with the Federal Deposit Insurance Corporation that the latter would refuse to insure its deposits after the acquisition of an interest in its stock by Transamerica Corporation, if it should "withdraw from the Federal Reserve System". That disclosure was first made by the petitioner Eccles in a letter to Mr. A. P. Giannini, Chairman of the Board

of Transamerica, on November 13, 1942 (R. 65, 84), and was not made known to the respondent bank until March 24, 1944, nearly two years after the original imposition of the condition (R. 32, 107).

Unfortunately for the Bank,—in that this lawsuit was thereby made necessary—respondent was wholly without power to prevent its stockholders from selling stock owned by them to any person or corporation they saw fit, and they had not even been called upon to restrict their right to do so. The complaint alleges (par. X, R. 5-6) without denial by the answer that respondent has no power of control over the dealings of its stockholders with their stock, and hence was utterly without power to prevent a violation of Condition No. 4. It would be ridiculous to suggest that the Bank had power to prevent some bank in the so-called "Transamerica group" or Bank of America from making a loan to a stockholder and taking a pledge of the Peoples Bank stock as security for that loan. Yet even such a transaction would constitute a violation of Condition No. 4.

No matter what respondent bank did, no matter how much it might have desired to avoid conflict with the petitioners concerning their anti-Transamerica "policy", respondent realized for the first time on March 24, 1944, that if this Condition No. 4 were not adjudged invalid, respondent's very existence might be terminated at any time at the whim of these petitioners,—all because Transamerica Corporation had bought 500 (out of a total of 5,000) of the outstanding shares of respondent's capital stock (Compl., pars. XI, XII and XIII, R. 6-7). Accordingly on that day respondent's Board of Directors authorized the insti-

tution of legal proceedings to determine the legal effect of Condition No. 4 (R. 32).

Suit was commenced immediately against the Board and others in the United States District Court for the Northern District of California, but the Board declined to submit to the jurisdiction and that case was dismissed (R. 32).

Peoples Bank v. Federal Reserve Bank of San Francisco, et al., 58 F. Supp. 25 (N.D.Cal. 1944); appeal dismissed 149 F. 2d 850 (C.C.A. 9th, 1945).

Thereafter, a formal demand for the cancellation of Condition No. 4 was made upon the Board on December 4, 1945, but was not complied with (Complaint, par. XIV, R. 7). This action was then commenced on December 24, 1945.

The complaint alleges and the answer necessarily admits that the termination of the Bank's System membership would cause it to lose its status as an insured bank, and "such loss would render the plaintiff unable lawfully and advantageously to pursue its functions as a bank and to conduct its operations to the advantage of its stockholders and the public served by it under supervision according to law" (par. 'X, R. 5-6).

The documentary evidence annexed to the affidavits submitted by the Bank also shows the circumstances in which the petitioners' anti-Transamerica "policy" was developed. No pretense was made that it represented the Congressional intent. No claim was made that the petitioners had any legal right to stop the expansion or prevent the further investment in bank stocks by Transamerica Corporation. No suggestion

is made that either the Bank or Transamerica Corporation or anybody else affected by the so-called "policy" was given any opportunity to attend any administrative hearing looking toward the establishment of such "policy" in the public interest (R. 56-67). Indeed it is not suggested that the phrase—"in the public interest"—even appears anywhere in the Federal Reserve Act in relation to member banks. Instead, we have the bald admission by these petitioners and their representatives that they, in secret meeting with the Comptroller of Currency and the Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, unanimously agreed that they should

~~"under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group" (R. 69-70),~~

and that the Federal Deposit Insurance Corporation should decline

~~"to insure any newly organized state nonmember bank in which Transamerica Corporation has a substantial interest or *any bank in the group which may withdraw from the Federal Reserve System*" (R. 84).~~

In view of the unique character of Condition No. 4,—the only instance brought to the court's attention in which compulsory withdrawal on notice has been made a condition of membership—it is apparent that the words italicized in the last quotation were aimed directly at this respondent bank.

The petitioner Eccles, Mr. Leo T. Crowley, who was then Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and other spokesmen for the petitioners have admitted time and again in testimony before Congressional committees and other public records (despite implications to the contrary in Condition No. 4), that they do not possess any power under existing law to restrict the expansion of bank holding companies; and the Congress, although aware of this condition and of the petitioners' desire for such power, has steadfastly refused to enact any legislation designed to confer such power (Andrews aff., R. 67-68; Exhs. 24, 25, 26, 27 and 28, R. 96-103), although, as this Court is doubtless aware from its knowledge of current events, contemporaneously with the filing of the petition for certiorari in this case, the petitioner Eccles was renewing his plea to Congress for the enactment of a bill (S. 829, 80th Congress, First Session), which would give the Board the power to do that which in this case they are seeking to convince this Court they already have the power to do. Chairman Eccles testified before the Senate Banking and Currency Committee on S. 829, on May 26, 1947, as follows:

"In order to establish branches, national banks must first obtain permission from the Comptroller of the Currency, State member banks from the Board and non-member insured banks from the FDIC. But the bank holding company is not subject to any such requirements. If a bank in its group is denied the right to establish an additional office, *there is nothing to prevent it from acquiring the stock of an existing bank and simply adding the institution to its list of controlled banks, operating it, for all practical pur-*

poses, as a branch of the entire system." (Transcript of Hearings, p. 17.)

The bill was favorably reported to the Senate, but the Congress adjourned without taking further action respecting it.

Petitioners now agree (Pet. Br. p. 8, fn.3) that they have "admitted that the law as it now stands does not empower the Board to disapprove bank acquisitions by bank holding companies *generally*". In their actual testimony before Congressional Committees, however, they have several times admitted their lack of power to prevent additional bank stock purchases by Transamerica Corporation *specifically* (R. 98, 100, 101).

The imposition of Condition No. 4 upon the Peoples Bank permit was part and parcel of the Board's anti-Transamerica "policy". This is apparent not only from the wording of Condition No. 4 but from the circumstance that the letter from the Board denying the original Peoples Bank application for membership was written on the same day and signed by the same man as the letter to Transamerica Corporation announcing the adoption of the "policy" of declining permission to Transamerica to acquire "any substantial interest" in banks (R. 63-64; 69-70).

The correspondence annexed to the Andrews affidavit (Exhs. 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, R. 69-96) shows eloquently on its face the atmosphere in which Condition No. 4 and the entire anti-Transamerica "policy" were conceived. Indeed, the correspondence shows more than that. It contains one labored effort after another by the petitioner Eccles to state

arguments which might indicate that such a "policy" would be in the public interest, and it shows that each such effort was answered with a recital of facts,—indisputable facts generally based on official statements and reports—which foreclosed the possibility of a plausible answer. And all the while, it was conceded by the defendants that the Congress,—the only body vested by the Constitution with a lawful right to declare such a policy, assuming it to be in the public interest, had turned a deaf ear to the pleas of the petitioners to pass a law authorizing the enforcement of their "policy".

The final evidence that Condition No. 4 was imposed on the respondent in an endeavor to effectuate a policy of discrimination, applicable with special violence to the respondent but founded in the official dislike for Transamerica Corporation, is referred to in the Ponsford Affidavit (R. 103-106). That affidavit, summarizing official publications of the Board, shows that at or subsequent to the time of admission of Peoples Bank to membership in the System, five state banks—two in Montana and three in Minnesota—have been admitted to membership, although affiliated with Northwest Bancorporation, a bank holding company. It also discloses that since the date of admission of Peoples Bank to the Reserve System there have been admitted to such system four California state banks, one of which has recently been absorbed by the American Trust Company of San Francisco, a state member bank operating a large branch banking system. It further appears that the American Trust Company has actually been authorized by the Board to operate a branch at the location of said absorbed bank.

The complaint alleges that Condition No. 4 was and is "~~arbitrary, unreasonable, capricious, discriminatory, *ultra vires*~~ the authority of the Board, null and void", etc. It further alleges that any action taken pursuant to said void Condition No. 4 would constitute a **taking of respondent's property** without due process of law (par. IX, R. 5). Certainly, the allegations as to the arbitrary and discriminatory character of Condition No. 4 are allegations of fact which are admitted by the answer. The official records of the Board which are not available to the Bank without discovery, could disclose beyond dispute whether any condition comparable to Condition No. 4 has been imposed upon any of the other nine institutions mentioned. There has been no such disclosure. The hearsay disclosure now made by the Solicitor General (Pet. Br. pp. 14-15, fn. 5) sustains fully respondent's contention that in no other instance has the Board imposed a condition in which the proscribed conduct was wholly beyond the control of the member bank subjected to the Condition. In these circumstances and in view of the undisputed facts in this record, the charge of discrimination is clearly established as an undisputed fact.

The present injury and continuing embarrassment to the Bank from Condition No. 4 and the nature and extent of its interference with the normal conduct of respondent's business,—including the impairment of respondent's ability to compete with other banks freely and on a basis of equality—are readily apparent from a reading of the condition. Such effects are strongly corroborated by the affidavits of Mr. Brewer, the President of respondent bank (R. 106-108), and of Mr. Luddy, a stockholder and director, who pur-

chased his stock without knowledge of the existence of Condition No. 4. (R. 109-110).

SUMMARY OF ARGUMENT.

I.

The undisputed facts show that the respondent Bank, through the imposition of a so-called condition of membership, is unwittingly made the chosen instrument of the petitioners in an unprecedented effort to exercise a power which, by their own later confession, is non-existent—a power to restrict and supervise the investment of one corporation in bank stock. They show that this restriction is arbitrary and discriminatory and has been attempted without any proceedings having been taken with respect to such corporation pursuant to any law. They further show that the petitioners concealed from the respondent, at the time of its admission to membership in the Reserve System, the secret plan of the petitioners and others to aggravate the resulting unfortunate position of the respondent through an extra legal commitment of the Federal Deposit Insurance Corporation for non-insurance.

The statutory authority of the Board to prescribe conditions of membership of state banks in the Reserve System does not extend to a prohibition upon the sale of a share of stock by one of its shareholders to another person, or to the exaction of a commitment from a bank that it will withdraw from the System upon notice from the Board, hinged upon a contingency beyond the bank's control or responsibility. Such a commitment would limit membership to the Board's pleasure and is not a valid condition.

Statutory authorization for conditions of membership is measured and limited by the statutes governing qualifications of banks and enumerating the factors to be considered by the Board in admitting a bank. Authorization to consider the "general character of its management" does not extend to considering the identity of the bank's possible future shareholders.

Prior to 1927 the Federal Reserve Act had delegated to the Board general discretion to prescribe conditions of membership for applying state banks. A 1927 amendment provided that any conditions of membership must be "pursuant to" the Act. This express restriction prohibits the Board from conditioning membership upon contingencies which are beyond the bank's control, which have no relation to its condition or operations, which do not involve conformity to accepted banking standards and which are not based upon any provision of the Act. Concurrently with the amendment, the Board itself construed the Act to preclude conditions similar to Condition No. 4.

The statute does not authorize the Board to contract with applicants for admission to the Reserve System and unauthorized conditions of membership are therefore void.

The claimed authority to prescribe the condition in question here conflicts with other statutory provisions relating to (a) bank supervision, (b) the protection of banks from any unsafe and unsound practices, and (c) the furnishing of the same opportunity to "all banks" to avail themselves and their patrons of the benefits of federal legislation designed to secure sound operations.

II.

To construe the statute as authorizing the Board to expel a bank for the sole reason that a designated organization, not proscribed as a result of any proceeding against it, acquired an interest ("any interest") in its stock would render the statute unconstitutional.

III.

The soundness of the operations of the respondent bank is not affected by the character of the operations of a minority stockholder and the effort to justify the condition by an attack, unwarranted by the record, upon a proscribed minority stockholder without allegation or proof, is improper and not within the issues.

IV.

When an eligible bank becomes a member of the Federal Reserve System the relationship is mutually advantageous to the bank and to the System. The System suffers no detriment or disadvantage thereby, and the bank only obtains the privileges which the law offers all banks equally in similar circumstances. There is no basis to cstop the bank from questioning the claimed authority of the Board to expel it for a reason which does not arise until long after the bank becomes a member and which, even then, does not affect its qualifications to continue as a member. Estoppel is a doctrine of equity designed to prevent injustice. It cannot be invoked in circumstances where it would operate as a substitute for undelegated administrative power nor to perpetuate unauthorized discrimination and inequality. The estoppel claimed is not based upon any misrepresentation of fact or in-

tent; and the acts relied upon to support estoppel were induced without a statement by the Board of relevant facts known to it but not known to the bank.

V.

The record shows that the condition was imposed with a serious purpose to enforce it; also, that the contingency has arisen in which enforcement within the intent has become possible. The respondent has availed itself, unsuccessfully, of its only administrative remedy and has exhausted that remedy. The requirement of any further administrative hearing, according to petitioners' own interpretation, would "emasculate the Condition." "The existence of Condition No. 4," in the language of the Court of Appeals, "does incalculable harm to the bank." Its effect is constant. In these circumstances, the remedy of declaratory judgment is appropriate.

ARGUMENT.

POINT I

CONDITION NO. 4 IS NOT VALID.

1. The subject-matter of the Condition is not within the legislatively delegated discretion of the Board.

Petitioners concede (Br. p. 12) that the issue on the merits in this case is the "relatively narrow one: Is Condition No. 4 one which is 'pursuant' to the Federal Reserve Act?" They seem to agree also that statutory authorization for the Condition must be found, if anywhere, in one of two paragraphs of the Act: Section 9(3) (12 U.S.C. § 322), or Section 12B(g) (12 U.S.C. § 264(g)). We do not agree that the other sections of the Act may be ignored, for, as we shall point out

later, many of them are flatly inconsistent with a legislative delegation of any such power as petitioners now claim. However, before considering the other sections, we shall answer petitioners' contentions respecting the two paragraphs on which they rely. Those two paragraphs read as follows (the factors relied on by petitioners being italicized):

Federal Reserve Act, Section 9 (12 U.S.C. § 322)

“STATE BANKS AS MEMBERS

“* * *

“3. *Financial condition, management and powers*

“In acting upon such applications (i.e. for System membership) the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, *the general character of its management*, and whether or not the corporate powers exercised are consistent with the purposes of this Act.”

Federal Reserve Act, Section 12B (12 U.S.C. § 264)

“INSURANCE OF BANK DEPOSITS

“* * *

“9. *Factors to be considered in insuring banks*

“(g) The factors to be enumerated in the certificate [of the Board] required under subsection (e) and to be considered by the board of directors [of the FDIC] under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, *the general character of its management, the convenience and needs of the community to be served by the bank*, and whether or not its corporate powers are consistent with the purposes of this section.”

In attempting to justify Condition No. 4 as relating to "the general character of its (the Bank's) management," petitioners argue (Br. p. 13) "that the responsibility for supplying the management of a corporation is placed by law upon its stockholders." So far, so good. But they then apparently seek to imply, without ever quite saying so, that the only effect of Condition No. 4 was to prevent Transamerica from "supplying" an improper management. It borders on the ridiculous to suggest that because Congress has wisely given the Board power to consider "the general character of the Bank's management", the Board may also regulate and prescribe specific prohibitions against the identity of the holder of one share of stock,—or even against the identity of a bank which may make a small loan upon the security of one share of stock. How far beyond the statutory limit of its authority does this administrative agency propose to go? May it prescribe prohibitions of who shall be a stockholder of a corporation which is a stockholder of a bank? May it prohibit a particular bank from lending money to a stockholder of a bank? May it prohibit a proscribed individual or corporation from being a stockholder of a bank which lends money to a stockholder of a stockholder of a bank? Surely, there must be a line drawn somewhere. We respectfully submit that Congress drew that line very clearly in the statute when it said that the Board might consider "the general character of its management", and said nothing at all about the character or identity of its stockholders.

The sincerity of petitioners' contention that the purpose of the Condition was to insure a sound management is belied by Point II of their brief (Pet. Br. p.

30), in which they claim that the interpretation placed upon the Condition by the Court of Appeals (requiring as a prerequisite to enforcement that the Board determine, after hearing, "that Transamerica's ownership of the Bank's shares has resulted in a change for the worse in the character of the Bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way") would "emasculate the Condition * * * thus stripping the Condition of its vitality."

The suggestion that the Condition relates to "the convenience and needs of the community to be served by the Bank" is apparently a new thought presented for the first time in this Court, something over five years after the Condition was imposed. It is even more ridiculous than the other suggestion. In the first place, it appears from the record that one of the items submitted by the Bank with its initial application for System membership (R. 33) was a communication from the Superintendent of Banks of the State of California under date of September 24, 1941 containing an official and unconditional finding (R. 34-35) "that the public convenience and advantage will be promoted by the establishment of a new bank in this location".

In the second place, the letter to the Bank dated March 11, 1942, which stated the Board's final additional requirements for reconsideration of the Bank's application, did not make the slightest reference to or raise any question respecting "the convenience and needs of the community to be served by the Bank".

Finally, when it is remembered that bank holding companies such as Transamerica Corporation, and

branch banking organizations such as Bank of America National Trust & Savings Association, are expressly recognized in the Federal Reserve Act and the National Bank Act as legal and proper instrumentalities to conduct the business of banking, it is absolutely absurd upon the face of it to suggest that it could make the slightest difference to the convenience and needs of the people of Lakewood Village whether a banking office in their community (the smallest bank in Los Angeles County) should have a few shares of its stock owned by Transamerica Corporation or by a customer of Bank of America.

If the Congress had intended the Board to consider the identity of present or future stockholders of an applicant for System membership, it could easily have said so. As we have seen Sections 9(3) and 12B(g) of the Act (12 U.S.C. §§ 322 and 264(g)), *supra* pp. 15-16, prescribed with considerable particularity the factors to be considered by the Board in passing upon such an application.

By the application of the doctrine *expressio unius exclusio alterius*, it would thus appear that the only factors to be taken into account by the Board in passing upon the application of a state bank for permission to become a stockholder, are the factors expressed in Sections 9(3) and 12B(g) of the Act. Consequently, since these matters to be considered have no connection, even remote, with stock ownership in the future it can be stated with conviction that the Board had no authority to consider and then impose conditions affecting possible stock ownership by a holding company at some future time.

2. The power of the Board to attach conditions to membership in the Reserve System is limited by statute and the Board has no discretion to exceed such limits. This conclusion is emphasized by the statutory history of the Federal Reserve Act.

The sole source of authority in the Board to impose any conditions upon a state bank's application for System membership is found in the following excerpt from Section 9(1) of the Act (12 U.S.C. § 321):

"* * * The Board of Governors of the Federal Reserve System, *subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto* may permit the applying bank to become a stockholder of such Federal reserve bank."

Paragraph 3 of the same section (12 U.S.C. § 322) and Section 12B(g) (12 U.S.C. § 264(g)), already quoted (*supra*, p. 25), express the only factors which may be considered by the Board.

The powers of the Board and the limitations imposed thereon by Congress may be seen in better perspective if we recall the original purpose and early history of the Federal Reserve System. The System was set up for the convenience and security of *all banks*,—not the privileged few. The primary aim in reality was to promote the public welfare by "recapturing the reserves of the country, to be impounded in 12 regional banks, for commercial rather than for speculative purposes." (Senator Glass, 66 Congressional Rec., Pt. 5, p. 4436.) *All banks* were encouraged by President Wilson to become members, "to promote the national welfare" as well as their own interest. This early history and fundamental purpose are repeatedly emphasized by William P. G. Harding, a

former Governor of the Board, in his book entitled "The Formative Period of the Federal Reserve System (During the World Crisis)" (1925). At page 83, *et seq.*, Mr. Harding quotes from an illuminating letter written by President Wilson on October 13, 1917 to all non-member banks urging membership in the System and pointing out the general availability of such membership. The President is quoted as saying in part:

"The Federal Reserve Act is the only constructive financial legislation which we have ever had which was broad enough to accomodate at the same time banks operating under powers granted by the general Government and banks whose charters are granted by the respective States. The unification of our banking system and the complete mobilization of reserves are among the fundamental principles of the Act."

He refers to then recent amendments which removed previous objections by state banks and says:

"As the law now stands, it leaves member State bank and trust companies practically undisturbed in the exercise of all the banking powers conferred upon them by the States. The law provides also in definite terms the conditions upon which any State bank or trust company may withdraw from the System."

He then shows that some of the largest are becoming members, points to the importance of finances resting "on the firmest possible foundation" and being "adequately and completely conserved", and asks:

"How can this necessary condition be brought about and be made permanently effective better than by the concentration of the banking strength of our country in the Federal Reserve System."

"May I not, therefore, urge upon the officers and directors of all non-member State banks and trust companies, *which have the required amount of capital and surplus to make them eligible for membership*, to unite with the Federal Reserve System now and thereby contribute their share to the consolidated gold reserves of the country? I feel sure that as member banks they will aid to a greater degree than is possible otherwise in promoting the national welfare, and that at the same time, by securing for themselves the advantages offered by the Federal Reserve System, they will best serve their own interest and the interest of their customers."

Prior to the amendments referred to, membership was confined almost wholly to national banks and embraced considerably less than half the banking resources of the country. (Harding, "The Formative Period of the Federal Reserve System (During the World Crisis)" (1925), p. 70.) After the amendment and after the President's appeal, large and small state banks came in and the resources of the System were raised to about 70% of the whole. (Harding, *id.*, pp. 84-85.) Today it embraces about 86%.

The Congressional intent that the Board should not have authority to roam at large in the prescription of conditions has been made very clear. The Court of Appeals in the opinion now subject to review has accurately set forth the legislative history of the amendment to Section 9(1) of the Act in the following language (R. 127):

"Prior to 1927, the governing body of the Federal body of the Federal Reserve System had the very broadest power to attach conditions to a bank's entry into the System. The statutory lan-

guage [40 Stat. 233, Public Law 25, 65th Congress, approved June 21, 1917] on the subject was:

“‘The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the applying bank to become a stockholder.’

“At a hearing before a subcommittee of the Senate Committee on Banking and Currency in February 1926, Senator Carter Glass stated that the Federal Reserve Board (predecessors of appellees here) ‘has usurped the legislative functions of Congress.’ An amendment to restrict the power of the Board to impose conditions upon membership was being considered. Senator George Wharton Pepper, of Pennsylvania, who favored such an amendment said in the Senate, on February 23, 1925:

“* * * the committee thinks that the discretion of the Federal Reserve Board in the premises should be a discretion exercised pursuant to the provisions and conditions of the act; that is, that there was no intent of Congress, when the Federal Reserve Act was passed, to create in the Federal Reserve Board a body to prescribe any kind of conditions it pleased as conditions precedent to admissibility to the Federal Reserve System, but rather to confer upon the Federal Reserve Board authority to make regulations pursuant to the Act fixing the terms upon which banks might become members of the Federal Reserve System.’

“The Board of Governors desired to retain the right to impose any conditions it chose upon membership and expressed its unqualified disapproval of the amendment proposed. Nevertheless, in 1927 the Congress amended the provision to read as follows:

“‘The Board of Governors of the Federal Reserve System, subject to the provisions of this title and to such conditions as it may prescribe

pursuant thereto, may permit the applying bank to become a stockholder of such Federal Reserve Bank.' " [44 Stat. 1229, 12 U.S.C.A. 321.]

The accuracy of the court's statement of this legislative history has not been challenged in petitioners' brief. Indeed, it could not be and would not be challenged by the petitioners because it convincingly reveals the unmistakable intention of Congress with respect to restrictions upon the power of the Board to impose conditions.

The Federal Reserve Board itself recognized the restrictive effect of this amendment by the following statement appearing in its Annual Report to Congress for the year 1927, at page 43:

"Conditions of membership which may be imposed on State member banks.—The first paragraph of Section 9 of the Federal reserve act was amended by the McFadden Act so as to require that the conditions imposed by the Federal Reserve Board upon State banks admitted to membership in the Federal reserve system shall be pursuant to the Federal reserve act."

From the Senate Committee hearings it appeared that the amendment was occasioned by attempts of the Reserve Board, even at that early date, to prescribe conditions which the Board thought warranted. The Board had, as Senator Glass put it, "usurped the legislative functions of Congress." But the Board objected to the proposed restrictive amendment, saying:

"* * * the board has no hesitancy in expressing its unqualified disapproval of this proposed amendment."⁶

The amendment was nevertheless adopted.

In its letter of opposition the Board had declared that it would not "prescribe any condition of membership which will * * * subject the applying bank to any greater limitations or restrictions than those under which national banks shall operate; because the Board never has and never would prescribe any such *discriminatory* condition of membership."⁷

Until this Condition No. 4 was imposed upon Peoples Bank by these petitioners Governor Platt, who had given these assurances to the committee, was never exposed as a false prophet. The possibility of such action, however, apparently was foreseen by the Congress which adopted the restrictive amendment.

It was even brought out in the course of the hearings that such a limitation was once in the law but had been omitted "inadvertently" later, according to the statement of Senator Glass, "the father of the

⁶See Testimony of Dr. H. P. Willis and Comments of Senator Glass thereon at pp. 123-125 of Printed Transcript of Hearings Before a Sub-committee of the Committee on Banking and Currency, United States Senate, 69th Congress, First Session, on S. 1782 and H.R. 2, Held February 16, 17, 18 and 24, 1926.

⁷See Letter Submitted by Vice Governor Edmund Platt to Chairman McFadden of the House Committee on Banking and Currency Dated February 2, 1926, quoted at pp. 38-45 of Transcript of "Hearings before a Sub-committee of the Committee on Banking and Currency, United States Senate, 69th Congress, first session, on S. 1782 and H.R. 2" held February 16, 17, 18 and 24, 1926.

Federal Reserve System". During the testimony of Dr. H. P. Willis, a noted economist, at pages 132-135 of the printed transcript the following statements were made:

"Senator Glass: It was in the original Federal reserve act and how it got out I do not understand.

"Doctor Willis: Put those words in there and it will be impossible for the Federal Reserve Board to put banks out of the system because they have branch banks."

Of course, the Board could not exclude any national bank for such a reason as was suggested by Dr. Willis; but now, twenty years later, it provides for the expulsion of a state bank for a similar reason:

The "before" and "after" history of the Board's recognition of the significance of this important amendment is indeed most revealing. Before the McFadden Act was passed in 1927 the Board itself had made it plain by its own regulation (Regulation H, Series 1924, 10 Fed. Res. Bull. (1924) 279) that it would prescribe under its then sweeping authority regulations of broad scope, and the applicable regulation included nine paragraphs descriptive of the conditions it would impose in every case. Among those conditions was the following in Section IV:

"5. Such bank or trust company, except after applying for and receiving the permission of the Federal Reserve Board, shall not * * * directly or indirectly, through affiliated corporations or otherwise, acquire an interest in another bank in excess of 20 per cent of the capital stock of such other bank; nor directly or indirectly promote the establishment of any new bank for the purpose of acquiring such an interest in it; nor make any arrangement to acquire such an interest."

The pattern of this condition is probably the nearest approach in Federal Reserve history to Condition No. 4, but even it is not so drastic, in that it is a restraint upon the bank. This and the other proposed conditions, however, had challenged the attention of Congress (66 Congressional Record, Part 2, pp. 1463-68 (Jan. 8, 1925)) and resulted in the amendment to Section 9 which would restrict conditions of membership to those made "pursuant" to the Federal Reserve Act. It is interesting to note that the Board not only recognized the effect of the amendment as previously stated, but in its report to Congress for that year (1927) it said at page 40:

"Section IV of this regulation (H, Series of 1924), which relates to conditions of membership prescribed by the board when it admits State banks and trust companies to the Federal reserve system, *was amended so as to conform to the first paragraph of section 9 of the Federal reserve act, as amended by section 9 of the McFadden Act.*" (Fourteenth Annual Report of The Federal Reserve Board Covering Operations for the Year 1927, page 40.)

The amended Regulation H referred to (Regulation H, Series 1928, 14 Federal Reserve Bulletin (1928), page 76) omitted the fifth condition, partially quoted above, from the conditions of membership and it no longer imposed any restrictive condition with respect to "affiliated corporations"; and even with respect to an applying bank, the revised regulation carefully preserved the parity with national banks by imposing a restriction on stock purchases no broader than that applicable to national banks under 12 U.S.C. § 24 (Seventh) (prohibiting national banks from purchasing stocks).

The Board not only amended the regulation but stated that it amended it "so as to conform to the first paragraph of section 9" as the statute had recently been amended. It could have given to Congress no higher assurance than this that it conceived the omitted paragraph 5 to embrace a condition it was not authorized to impose under the amended Act and it was eliminating it pursuant to legislative compulsion. Remembering that it had resisted the amendment to the law and that it offered no other explanation for this amendment to its own regulation than conformity with the amended Section 9, the Board's action is most conclusive of its own concurrent interpretation of lack of power to impose such a condition as Condition No. 4.

The above quoted condition, now recognized by the Board as beyond its power by virtue of the 1927 amendment, is much more analogous to Condition No. 4 than any of the five illustrative conditions set forth in petitioners' brief (pp. 14-15, fn. 5). Every one of the latter was imposed with respect to a matter that the applying bank could control and they related directly to the conditions under which its own business would be transacted and its own operations pursued. In every case, in conformity with the *ejusdem generis* rule, the condition was of the same general character as those expressly set forth in the statute, and was also of the same general character as conditions 1, 2 and 3 under Regulation H. The absence from petitioners' brief of any illustrative condition of the character of Condition No. 4 serves to confirm the position taken by the Board after the 1927 amendment that it had lost the power to impose a condition of that character.

It is respectfully submitted that there could scarcely be a more perfect demonstration of both legislative intent and administrative recognition of that intent; and this Court, as did the Court of Appeals, should accept these concurring interpretations of the purpose and effect of the Act.

As further showing that Section 9(1) was never deemed by Congress to give the Board authority to impose Condition No. 4, it should be noted that in both the Banking Act of 1933 and the Banking Act of 1935, provision was made whereby it was compulsory for State banks to become members of the System by a stated time in order to retain their status as, or to become, insured banks.* When Congress required membership in the System to be obtained in order that the banks be continued as insured banks it did not authorize discrimination to be practiced against those which might have corporate shareholders. Stock in many such state banks throughout the country was held by corporations which either were or were capable of becoming holding company affiliates. Congress not only knew this as a matter of common knowledge, but it legislated elaborately on the subject of holding companies in the same act that created the Federal Deposit Insurance Corporation,—the Banking Act of 1933. To have excluded such banks from membership in the System and from insurance because some corporation owned a few shares of their stock

* The Banking Act of 1933, required all State banks to become member banks by July 1, 1936, in order to remain or become insured. Section 8, Banking Act, 1933, 12B(1)(7) (Act of June 16, 1933, c. 89, 48 Stat. 162). 12 U.S.C. § 264(y) (Act of August 23, 1935, c. 14, 49 Stat. 684) contained a similar provision which has since been repealed.

was not by the remotest inference authorized and it would have been altogether unthinkable.

Further emphasis of the Congressional intent that the Board of Governors was not to be permitted to roam at large in imposing conditions, but must look to the authority granted by the statute, is given by Sections 9(8) and 9(9) of the Act (12 U.S.C. §§ 327 and 328).⁹ Section 9(8) authorizes the Board to require a forfeiture of membership on a showing "that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto", but significantly requires restoration of the erring bank to membership "upon due proof of compliance with the conditions *imposed by this section.*" Section 9(9), by the phrase "under authority of law", again negatives the existence of any "general discretion" in the Board of Governors to deprive a member bank of its privileges.

Section 9(11) of the Act (12 U.S.C. §329a)^{9a} expressly gives the Board power "in its discretion", after admitting a state bank to membership with less than the ordinarily required capital, to require it to increase its capital and surplus. *Such* a condition is "subject to the provisions of the Act" and "pursuant thereto".

By Regulation H, Section 6, the Board has established three standard conditions to be attached to every permit and consequently, in fact, attached to the permit given to the plaintiff. But these standard conditions are nothing more or less than the Board's para-

⁹Appendix, pp. A-2 to A-4.

^{9a}Appendix, p. A-4.

phrase of the requirements of the statute, and therefore place no restrictions upon the conduct of the member bank other than those that the statute itself requires.

In Regulation H, Section 6, the Board states that "*pursuant to the authority contained in the first paragraph of Section 9 of the Federal Reserve Act*" (12 U.S.C. § 321) "the Board * * * will prescribe the following conditions of membership for each State Bank hereafter applying for admission to the Federal Reserve System, and, in addition, such other conditions as may be considered necessary or advisable in the particular case". It cannot be consistently argued that Condition No. 4 is one of "such other conditions" which the Board believes "necessary or advisable in the particular case." The Board, in Regulation H, Section 6, quotes as the source of its authority for the regulation, the limiting language of the statute, to-wit, that the conditions must be such as "it may prescribe pursuant thereto". So the Board, in adopting the regulation clearly contemplated that these "other conditions as may be necessary or advisable in the particular case", must be conditions that are authorized by statute.

3. Any condition or regulation imposed in excess of statutory power is void. The statute does not authorize the Board of Governors to make "contracts" with applicants for admission as to the circumstances in which they will withdraw.

There is nothing unusual, as the petitioners would have the court believe, about a regulatory agency being *restricted* in the exercise of its discretion to the imposition of regulations in harmony with the statute creating the agency. As this Court said in *Manhattan*

General Equipment Company v. Commissioner, 297 U. S. 129, at p. 134:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 320-322; *Miller v. United States*, 294 U. S. 435, 439-440, and cases cited."

The Court decided in the *Manhattan* case that the regulation in question was invalid because both inconsistent with the statute and unreasonable.

In *Waite v. Macy*, 246 U. S. 506, the plaintiff sought an injunction to prevent the appellants, as constituting the board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiff tests which it was alleged were illegal and which, if applied, would lead to the exclusion of the tea. The Court found that the regulation established a ground for exclusion of the tea not recognized by the statute and therefore sustained the injunction, saying, at page 610:

"The Secretary and the board must keep within the statute, *Merrit v. Welsh*, 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544 * * *"

In *Morrill v. Jones*, 106 U. S. 466, Jones sued Morrill, a collector of customs, to recover duties paid

under protest. The statute provided that animals imported for breeding purposes should be admitted free, under such regulations as the Secretary of the Treasury might prescribe. The Secretary had adopted a regulation providing that the collector should "be satisfied that the animals are of superior stock". The court held that the regulation was in excess of the power of the Secretary and invalid.

A recent reiteration by this Court of the requirement that authority for the exercise of administrative discretion be found in the governing statutes appears in *Hannegan v. Esquire, Inc.*, 327 U. S. 146. In that case the court held unauthorized an attempt by the Postmaster General to restrict the statutory classification of publications entitled to second class mailing privileges. The court did not question the good faith of the Postmaster General in establishing a "policy" which he deemed in the public interest, but it pointed out that he had not been given the statutory right to apply any such "policy".

Vom Baur in Vol. 1, Federal Administrative Law, § 25 (1942), states:

"If the statute sets up standards governing the exercise of the authority conferred, the delegate cannot act validly except within those standards; and findings by the delegate as to the existence of the required basis for its action are necessary to sustain that action. Otherwise the case would still be one of an unfettered discretion, as the qualification of authority would be ineffectual."

In *International Railway Co. v. Davidson*, 257 U. S. 506, Mr. Justice Brandeis, writing for an unanimous court, upheld the sufficiency of a bill for an injunction,

restraining the imposition by the Collector of Customs of regulations going beyond the scope of the statute, in the following language (at p. 514):

"Section 161 does not confer upon the Secretary any legislative power, *Morrill v. Jones*, 106 U. S. 466; *United States v. George*, 228 U. S. 14. A regulation to be valid must be reasonable and must be consistent with law."

The restrictions upon the exercise of administrative discretion granted by statute were well stated in the Final Report of the Attorney General's Committee on Administrative Procedure, published in 1941. At page 2 of their report they stated:

"It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it (i.e. the Congress) has embodied in law, whether it be a unified transportation or communications system, or old-age security, or the prevention of unfair practices in competition or in labor relations. But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others. Procedures must be judged by their contribution to the achievement of these ends."

Accord:

Campbell v. Galeno Chemical Co., 281 U. S. 599, at 610;

Colorado v. Toll, 268 U. S. 228;

Miller v. U. S., 294 U. S. 435;

Vom Baur, Federal Administrative Law (1942 Ed.), Vol. 1, Section 499;

Lynch v. Tilden Produce Co., 265 U. S. 315;

Koshland v. Helvering, 298 U. S. 441.

The theory of Condition No. 4 is quite peculiar. If a condition were one which the Board is authorized to attach to a permit, then upon the failure of such member bank to comply with the terms of the condition, the Board has authority to *compel* such member bank to retire from the system through the surrender of its stock, by proceeding under Section 9(8) of the Act (12 U. S. C. § 327).¹⁰

The very fact that the Bank was required to accept the condition and to agree to comply therewith is cogent evidence that the Board did not believe that it could impose the condition, relying solely on its own power, and make it effective. It is no part of the scheme of the statute or of the regulations that the applying member bank should be required in express terms to accept valid conditions and to agree to comply therewith. *Valid conditions are completely efficacious by virtue of their own strength, unsupplemented by any agreement. The statute will be searched in vain for any provision making membership in the System a subject of contract.* There are very sound reasons why this is so. Any such provision would introduce inextricable confusion and be utterly inconsistent with the equal enjoyment by all qualified banks of the advantages of membership.

It thus appears that at the very outset the Board was clear in its own mind that it had no power to impose the terms of Condition No. 4 as a condition,

¹⁰Appendix, p. A-2.

and consequently it was seeking to accomplish its unauthorized purpose by exacting from the Bank a promise to exercise a privilege that would belong to the Bank—something that the Board clearly had no right to do; also something that the board of directors of the Bank could not properly agree to in view of their constant and continuing obligations to the depositors and stockholders as well as their legal inability to bind their successors. *The statute vests the option of withdrawal in the member bank and in no one else.*

4. Not only is there no authority in the statute for Condition No. 4, but it is in direct conflict with several provisions of the statute.

(a) *Condition No. 4 is directly contrary to the stated purpose of Section 12B(y) of the Act (12 U.S.C. § 264(y)) (Federal Deposit Insurance provisions of the Federal Reserve Act).*¹¹ That section, which is entitled “Non-discrimination”, states that the purpose of the Federal Deposit Insurance provisions is “to provide *all* banks with the same opportunity to obtain and enjoy the benefits” of Federal Deposit Insurance.

Thus, if respondent had chosen to become merely a non-member insured bank, no conditions of any kind could have been imposed lawfully upon it by the Federal Deposit Insurance Corporation. Yet, if Condition No. 4 be held valid, the respondent will be in the anomalous position of being subject, at the will of petitioners to deprivation of its status as an insured bank by being deprived of its status as a member bank, thereby depriving it of the “same opportunity

¹¹ Appendix, p. A-11.

to obtain and enjoy the benefits" of Federal Deposit Insurance along with "all banks". Indeed, it appears that, without advance notice to either the Bank or Transamerica Corporation, the petitioners have entered into an agreement with the Federal Deposit Insurance Corporation that the Bank will be denied Federal Deposit Insurance upon withdrawal from the Federal Reserve System (Eccles letter November 13, 1942, R. 83-84).

This is in direct conflict with Section 12B(y) which says that such discrimination shall not take place "in any manner".

(b) *Condition No. 4 runs counter to a number of provisions expressly contemplating that the stock of a state member bank may be held by a holding company.* There are so many provisions of the Act expressly contemplating that stock of a state member bank may be owned by a holding company that argument would seem unnecessary to demonstrate the propriety of such ownership. We confine ourselves, therefore, to a listing of a few of the sections of the Act containing such provisions:

§ 4(16) (12 U.S.C. § 304) — Only one bank so affiliated may vote for Federal Reserve Bank directors.

§ 9(16)(17)(18) (12 U.S.C. § 334) — Reports from a state member bank shall set forth information as to relations between such bank and its holding company affiliate.

§ 21(9) (12 U.S.C. § 486) — Waives requirement of reports respecting holding company affiliates in certain instances.

§ 9(21) (12 U.S.C. § 337) — State member bank must obtain agreement from its holding company affiliate that latter will be subject to "the same

conditions" as holding company affiliates of national banks and if voting permit of affiliate is revoked all affiliated member banks of such affiliate may be required to forfeit their Federal Reserve memberships.

Also prohibits affiliation with corporation engaged principally in issue or flotation of securities. Under the doctrine of *expressio unius exclusio alterius*, this would permit affiliation with other types of corporations. This is recognized by the Board and one of the chief objectives of the pending bill (S. 829), which it is sponsoring, is to amend the law in this respect.

§ 9(22) (12 U.S.C. § 338)—Holding company affiliates of state member banks are subject to examination by examiners selected by Board of Governors.

§ 23A (12 U.S.C. § 371c)—Provides limitations upon member banks making loans to affiliates or purchasing their securities or accepting such securities as collateral.

See also—Rev. Stat. § 5144, as amended by the Banking Acts of 1933 and 1935 (12 U.S.C. § 61)¹²—Holding company affiliate required to enter into certain agreements, stated in the law, in applying for a voting permit—but *not* an agreement to limit future stock acquisitions.

From these statutes at least four conclusions are apparent:

1. That a bank holding company is recognized by law as a legitimate organization which operates under the supervision of the Board.

2. That no power exists in the Board to place any restriction whatsoever on the acquisition by a holding

¹² Pet. Br., Appendix, p. 45.

company of any amount of stock in either a state member bank or a national bank.

3. That a state bank is entitled to membership in the System on the *same terms and conditions as a national bank.*

4. That any so-called "condition" of membership which would operate to remove a member bank from the System on account of a lawful acquisition of stock by any association or holding company would impose a penalty where no offense has been committed,—a penalty which is inconsistent with the rights of both the company and the bank as clearly recognized in the statutes.

In the face of all these provisions, it is clear that, as one of the "conditions * * * pursuant thereto" which the Board may prescribe in connection with its permit to an applying state bank, it cannot prescribe that the state bank shall not have a holding company affiliate. Congress has clearly recognized that this is beyond the control of the Board. Obviously, the greater includes the lesser, and therefore it is clear that the Board may not prescribe that if any of the stock (no matter how little) of the applying state bank shall be acquired subsequently by a holding company, the bank forfeits its rights as a member bank.

(c) *The imposition of Condition No. 4 runs squarely counter to the provision of Section 9(12) of the Act (12 U.S.C. § 330)¹³ which guarantees to state member banks the retention of their "full charter and statutory rights."*

¹³Appendix, p. A-5.

One of the "charter and statutory rights" which plaintiff has as a state bank is that its stock may be held or sold by its various owners. The laws of California impose no restrictions whatsoever upon the ownership of stock of the Peoples Bank by Transamerica, or any other company. In this connection, see the illuminating interpretation of Acting Attorney General John W. Davis in 31 Opinions of the Attorneys General, 153, September 10, 1917, holding that Clayton Act restrictions upon interlocking directorates do not apply to state banks joining the Federal Reserve System. We quote two brief, but very material excerpts:

"Unlike national banks, State banks are not compelled, but in effect are invited, to join the Federal Reserve System. In Section 9 as originally enacted *Congress specified the provisions of law to which State banks must conform as conditions of membership* including in the specification certain provisions of preexisting law. The conditions of membership for State banks having thus been specified it could be argued not without reason that if Congress had intended by section 8 of the Clayton Act to prescribe further conditions of membership it would have affirmatively expressed that intention, which it has not done
* * *

"The intention of Congress, however, is not left to appear by implication alone. Section 9 as amended goes further, and by positive provision declares that State member banks shall retain their 'full charter and statutory rights' as State banks, 'subject to the provisions of this act and to the regulations of the board made pursuant thereto.' Since the rights existing under State laws as to selection of directors seem clearly among the 'charter and statutory rights' thus retained in *full* by State member banks, they must

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be held free in that regard from the restrictions imposed by section 8 of the Clayton Act" (pp. 156-157).

Further, it is a "privilege", certainly, of national member banks, to have the stock thereof owned in part or in whole by a holding company. That being a privilege of a national member bank, it is, by virtue of Section 9(12), also a privilege of a state member bank.

(d) *Condition No. 4 also runs counter to the provision of Section 9(9) of the Act (12 U.S.C. § 328)¹⁴ which authorizes state member banks "desiring" to withdraw from the system to do so. Condition No. 4 is a requirement that the plaintiff bank, to quote the condition, "shall withdraw from membership", not when it so desires, not when its then board of directors finds it in its interest to do so, but, due to a condition imposed on it in May, 1942, when through some circumstance over which it has no control, to wit, the acquisition by Transamerica of some stock therein, the Board requests it to withdraw. That which is voluntary under the statute is sought to be made compulsory by the condition. "The membership of a state bank in the Federal Reserve System is * * * purely voluntary both in its inception and duration". Fidelity-Philadelphia Trust Co. v. Hines, 337 Pa. 48, 10 A. 2d 553 (1940).*

(e) *If Condition No. 4 is an attempt to establish a method of protecting the Bank and the System against unsafe or unsound practices, it is inconsistent with the methods provided by Section 30 of the Bank-*

¹⁴Appendix, p. A-3.

ing Act of 1933 (12 U. S. C. § 77)¹⁵ and by Section 12B(i)(1) of the Federal Reserve Act (12 U. S. C. § 264(i)(1))¹⁶. Section 30 of the Banking Act provides a statutory method for protecting a member bank against "unsafe or unsound practices" on the part of its management, viz., *removal of the offending director or officer*, and a criminal penalty upon such director or officer if he thereafter participates in the management. There is no attempt, as petitioners contend, to control the discretion of the stockholders in the original selection of their officers and directors. There is no provision that the identity of the stockholders themselves should be subject to the approval of the Board of Governors.

Section 12B(i)(1) of the Act provides a further statutory remedy, applicable to all member and non-member insured banks, "whenever the board of directors (of the Federal Deposit Insurance Corporation) shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices * * *." This remedy affords the bank an opportunity to correct the unsafe or unsound practices and, failing to do so, it may then have its insurance terminated, and if the bank be a member bank it will be compelled to terminate its membership in the System. There is, of course, no contention in this case, in spite of the vague references by the petitioners to "unsound policies", that any occasion has arisen for the application of this statutory remedy. To utilize Condition No. 4 in such a manner as to impose these penalties upon the respondent bank would amount to an evasion of the specific provisions applicable.

¹⁵Appendix, p. A-11.

¹⁶Appendix, p. A-8.

We respectfully submit that the protection provided by Congress is better calculated to accomplish the purpose of the law. In any case, it is the only method provided by law and the petitioners' method is entirely inconsistent with it.

5. Not only is the condition invalid for complete lack of authority to impose any condition of that character and for that purpose, but it is also invalid because arbitrary, unreasonable and unjust, and because it is discriminatory.

The petitioners (Br. pp. 15-18) have cited several cases to support the proposition that the courts are without authority to substitute their judgment for that of administrative agencies or officers of the Government in matters properly within the discretionary powers of such agencies. With this general proposition we have no dispute. The proposition, however, is only a general one and is subject to well-recognized exceptions. In the court below the defendants cited as an authority for this proposition the case of *Ickes v. Underwood*, 141 F. 2d 546 (App. D. C. 1944). We note that this citation has been conspicuously omitted from their present brief, doubtless because the exceptions to the rule relied upon by petitioners were so well stated in the opinion of the court (141 F. 2d, pp. 547-548), as follows:

"The general rule is that the judicial power will not be interposed to limit or direct the exercise of discretion by public executive officers with respect to pending matters within their jurisdiction and control, *except in clear cases of illegality of action* * * *. As to what constitutes a clear case of illegality of action this court has said: (quoting from *Proctor & Gamble Co. v. Coe*, 96 F. 2d 518, 521, 522) *The following tests have been used to uphold the exercise of judicial re-*

straint upon executive action under valid laws:

(1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government * * *; (2) where an officer attempts to enlarge his power, or to usurp power * * *; or (3) where his act is based upon a clear mistake of law * * *; (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute * * *; (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner * * *; (6) where the act of the officer, "under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority (and) he has no power at all to do the act complained of * * *."

As we have previously pointed out, the imposition of Condition No. 4 by the Board brings this case within practically all of the exceptions to the rule.

The case of *Apfel v. Mellon*, 33 F. 2d 805 (App. D. C. 1929), heavily relied upon by defendants, involved an application for a writ of mandamus to compel the Federal Reserve Board to issue a permit for a corporation to engage in foreign banking. The banking statutes required the approval of the Federal Reserve Board, without setting up specific factors to be considered. The court held that the statute conferred upon the Board a discretion to grant or withhold such approval and that such discretion could not be controlled by mandamus. But, in contrast to the provisions for Federal Reserve membership and Federal Deposit Insurance, which were expressly intended to make such privileges available to all banks in the United States, the statute involved in the *Apfel* case was clearly intended to provide "a means for

conferring special and important privileges" (33 F. 2d at p. 807).

Gray v. Powell, 314 U. S. 402, held that whether or not a railroad was both a producer and consumer of coal so as to be exempt from certain provisions of the Bituminous Coal Act was a question of fact entrusted by that Act to the Director of the Bituminous Coal Commission and that where there was evidence to support the Commission's findings the court would not substitute its judgment for that of the Commission.

The other authorities relied upon by defendants in support of this proposition are of the same general character. All involved situations in which the matter in dispute was admittedly committed by law to the administrative discretion of the public official whose determination was attacked.

Adams v. Nagle, 303 U. S. 532;

Pacific States Box & Basket Company v. White, 296 U. S. 176;

Kennedy v. Gibson, 8 Wall. 498;

The Germania National Bank of New Orleans v. Case, 99 U. S. 628;

Bushnell v. Leland, 164 U. S. 684;

United States Sav. Bank v. Morgenthau, 85 F. 2d 811 (App. D. C. 1936);

Raichle v. Federal Reserve Bank of New York, 34 F. 2d 910 (C.C.A. 2d 1929).

The circumstance that the Board of Governors had some discretion as to the conditions they would impose, *within the range of their authority* with respect to the imposition of conditions, has no bearing on the question before the Court. Condition No. 4 is obviously outside of the realm of that authority and

consequently outside the realm of any discretion. It was purely arbitrary and capricious, and we have shown, page 45, *et seq.*, *supra*, even ran counter to several express statutory provisions.

Absolutely no discretion existed in the Board either to impose or not to impose a condition such as Condition No. 4.

Any condition which the Act in its present form authorizes the Board to impose pursuant to the Act, must be a condition which the Bank has the power to perform. It must be a condition affecting the Bank's operations, with respect to the performance or non-performance of which the bank has control. In fact, all the statutory provisions governing membership refer to the applying *bank* and to things which it must do, and not to its stockholders. To subject the Bank to a condition which might deprive it of its membership in the System and of its status as an insured bank for an innocent and lawful act of a stockholder over which it has no control whatsoever, could never have been contemplated by Congress. We repeat, that the condition is arbitrary, unreasonable, unjust, and, we say, vicious.

This point is well sustained in *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129, *supra*, p. 41. The Court said, at p. 134:

"And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Railway Company v. Davidson*, 257 U. S. 506, 514."

Accord

International Ry. Co. v. Davidson, 257 U. S. 506;

Nolan v. Morgan, 69 F. 2d 471 (C.C.A. 7th, 1934).

See also

Vom Baur, Federal Administrative Law (1942), Vol. 1, Section 500.

Nor can a regulation be discriminatory.

Bailey v. Holland, 126 F. 2d 317, 322 (C.C.A. 4th, 1942).

The Board therefore has no right to prescribe that the Peoples Bank shall be required to surrender its stock and cease to be a member in the event that a particular holding company, or any holding company, should acquire an interest therein, there being no similar power with respect to national banks. It does not even have power to make the same prescription with respect to *every* existing state member bank or applying state bank and as affecting *every* possible holding company through loans or otherwise. The right to discriminate in this situation would be an intolerable tyranny.

Transamerica owns sufficient stock in several member banks, both state and national, to make it a holding company affiliate of such banks and it has minority interests in other member banks, including Bank of America. None of them has been afflicted with a Condition No. 4 (R. 65). Another bank holding company, by way of example, owns the controlling stock of 80 or more banks and trust companies. Of the state banks owned by that corporation, several are members of the System, and we make bold to assert that no such condition as Condition No. 4, in any manner, shape or form, was attached to the admission of these state banks into the System (See R. 104-105). As

further proof of the arbitrary and discriminatory character of this condition, we have shown that four other California state banks have been admitted to membership subsequent to the imposition of Condition No. 4 on the respondent bank,—all of them presumably without any such condition. The absence of such condition is quite clear in the case of the Napa Bank of Commerce, the first bank in California admitted after the admission of Peoples Bank, as it is public knowledge that such bank has recently been absorbed by the American Trust Company of San Francisco, a state member bank, and that said Trust Company has been authorized by the Board to operate a branch at the location of said bank (R. 105-106). Thus we have the positive blessing of the petitioners bestowed upon a competitor of the respondent Bank and a competitor of Bank of America, while the latter are subjected to petitioners' threats and condemnation.

POINT II.

IF THE STATUTE HAD AUTHORIZED THE BOARD TO PRESCRIBE CONDITION NO. 4, IT WOULD BE AN UNCONSTITUTIONAL DELEGATION OF THE LEGISLATIVE POWER VESTED IN CONGRESS ALONE UNDER SECTIONS 1 AND 8 OF ARTICLE I OF THE CONSTITUTION. SUCH EXERCISE OF POWER BY THE PETITIONERS IS ITSELF A VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

We do not elaborate our constitutional argument, inasmuch as the petitioners have repeatedly admitted in their annual report (R. 96) and in their testimony before Congressional Committees (R. 97-100, 101-103) that they do not have any power, under their own interpretation of the statute, to impose any such restriction upon bank holding companies as was attempted by the prescription of Condition No. 4.

It is an elementary principle of statutory construction that a statute should be construed, if possible, in such a manner as to avoid any conflict with the constitution.

See

Panama R. Co. v. Johnson, 264 U. S. 375;

Lewellyn v. Frick, 268 U. S. 238;

Hassett v. Welch, 303 U. S. 303.

We submit that it is too clear for argument that Congress itself has no power to establish Condition No. 4 by direct legislation. It can, of course, say that no bank shall be a member of the Federal Reserve System whose stock is held by a holding company, but it cannot pick out one bank and say to that bank alone that it shall not be admitted nor retained as a member if any of its stock is held by a holding company, while all other similarly situated banks may be admitted or retained. Nor can Congress by legislation expressly discriminate against any particular holding company as a holder of stock in a member bank or against a particular bank like the Bank of America, acquiring an interest through commercial loans or otherwise in a member bank, for Congress itself would have to make its legislation applicable to all institutions that were in the same situation.

A fortiori, if Congress itself could not legislate the condition, it could not delegate to an administrative board like the Board of Governors any express authority or any discretionary authority enabling it to impose such a discriminatory condition. The respondent invokes the protection of the constitutional provisions referred to herein and specified in its complaint.

Schechter v. United States, 295 U. S. 495;

Panama Refining Co. v. Ryan, 293 U. S. 388.

POINT III.

NEITHER UNSOUND BANKING POLICIES NOR VIOLATIONS OF THE ANTI-TRUST LAWS HAVE BEEN ALLEGED OR PROVED. THE RECORD CLEARLY SHOWS THAT NONE OF THESE ELEMENTS IS PRESENT.

In all courts before which arguments have been presented in this case, the Petitioners have attempted to surround Condition No. 4 with an aura of justification based upon the theory that there is something "unsound" about Transamerica Corporation. Petitioners' brief in this Court presents the same thesis and adds to it the suggestion that Condition No. 4 is necessary to discharge Petitioners' responsibility under the Clayton Act (Pet. Br. pp. 10, 20, 22, 23-29).

Even if there were merit in these contentions, which we shall shortly demonstrate there is not, the Petitioners' assertion of high minded motives does not justify their illegal action. To warrant a reversal of the decision below, petitioners must successfully challenge the conclusion of law stated in the court's opinion as follows (R. 126):

"The broad discretion confided to the Board of Governors continues only so long as it acts within its statutory scope. When the Board reaches the border of the Federal Reserve Act it must stop, for to go beyond would be to impinge on Congressional prerogatives."

Because of the loose habit into which the petitioners have fallen of using the words "unsound" and "against the public interest" as applied to Transamerica Corporation, without specifying what they mean, we feel impelled to point out the true facts upon which such irresponsible and groundless charges are based. The situation was well summarized in the opinion of the Court below as follows (R. 124-125):

"This striking denunciation of Transamerica makes pertinent an inquiry into the nature of that organization. The record discloses it to be a large corporation, owning extensive interests in many banks and in other corporations as well. It is a substantial stockholder in the Bank of America, which for several years has been one of the two or three largest banks in the Nation. The financial soundness of Transamerica is not challenged. The character, integrity and ability of its management are not assailed. No statute, state or federal, forbids it to own shares of the Peoples Bank or any other bank.

"The basis for the imposition of this unusual and unqualified prohibition against Transamerica's acquiring shares of the bank in question is shown by the record to be the fact that for some time federal bank regulatory authorities, including the Board, have regarded further expansion of Transamerica as undesirable and unsound."

There is nothing in petitioners' charge to support the apparently desired inference that there is something "unsound" about the financial condition of any bank in which Transamerica Corporation is interested or about the banking policies of any such bank. Indeed, it is a matter of common knowledge that Bank of America, in which Transamerica has a substantial, although minority (approximately 25%) interest, is now the largest and generally recognized as one of the best managed banks in the United States. As pointed out in the opinion of the Court below, that Bank "for several years has been one of the two or three largest banks in the nation" (R. 124-125). But Transamerica itself is not a bank and does not have any banking policies. It is a bank holding company holding a general voting permit from the Board (R. 104) and as such it is under full legal supervision of the Board.

If there is anything wrong with Transamerica's so-called financial policies, this respondent bank cannot understand why it (not even an affiliate of Transamerica) rather than Transamerica or some bank which Transamerica controls, should be the one exposed to penalty. Certainly, the statutory obligation to protect the System against "unsound policies" of any other corporation subject to the regulatory jurisdiction of the Board is *upon the Board*, and not upon this respondent. Respondent recognizes that it must maintain sound management and sound banking policies, but forfeiture of membership or other penalties can only be imposed for failure to correct specific situations (See Banking Act of 1933, §30, 12 U.S.C. §77; Fed. Res. Act §12 B (i) (1), 12 U.S.C. §264 (i) (1)).¹⁷

Petitioners now claim (Pet. Br. p. 10) that the Board "had reason to believe that respondent was already under, or was about to come under, the control of Transamerica", and the Board might have been concerned respecting "respondent's welfare or that of the Federal Reserve System" if there should be domination by Transamerica's management. The Court below has found (R. 125) that:

"The fact is, however, that the record does not show that the Board had reason to believe that appellant, at the time its application was filed, was under or was about to come under the management of Transamerica."

And there are now no *ifs* to the purported applicability of this Condition under altogether different facts. The facts show that Transamerica *has not ob-*

¹⁷Appendix, pp. A-8 to A-12.

tained control and that the Condition before the Court contemplates that the respondent bank forfeit its membership at the option of the petitioners even if Transamerica or any other holding company should acquire a small minority of its stock. Control is not at all involved or necessary to invoke this forfeiture condition. Much less is management involved. As we have seen, the petitioners take strong exception to the suggestion in the opinion below that a hearing should even be required as to any change in the condition of the respondent bank before the forfeiture is invoked. Yet this "Sword of Damocles" continues suspended.

The suggestion that Transamerica or Bank of America ownership of "any interest" in the respondent bank might create a danger to respondent or to the Federal Reserve System or to Federal Deposit Insurance Corporation, or that petitioners might ever have thought that such a danger might be so created, is completely inconsistent with this record, which shows not only that Transamerica influence through stock ownership has contributed to the development of the leading bank in the United States but also that no bank in which Transamerica has ever had any substantial interest has failed to meet in full all of its obligations (R. 76-79; 92-95).

Indeed, the only basis shown by the record for the petitioners' use of the word "unsound" as applied to anything connected with Transamerica Corporation, appears in the testimony of the petitioner, Eccles, before a committee of Congress, in the course of which he expressed the personal opinion that a bank holding company should not be permitted to invest in bank stocks and in stocks of other industries at the same time and commented that he would regard such a

practice as "unsound"—but even he recognized that the law permits it (R. 98-100), and we note and the record shows that thus far his personal opinion has not been expressed in any legal enactment (R. 68). It would appear that the Congress has adhered to the view that diversification of investments lends strength to a bank holding company and so puts it in a *better* position to assist its bank affiliates in times of bank crises than it would occupy if, above the statutory minimum reserve, it owned nothing but bank stock.

As we have pointed out in subdivision 4(e) of Point I of this brief (*supra*, pp. 50 to 52), there are two specific and adequate methods of protecting the Bank and the System against "unsafe and unsound practices", and both conflict with the one contemplated by Condition No. 4. However, since petitioners have adopted the word "unsound" as their principal justification for Condition No. 4, it is interesting to note the sort of conduct which has been treated as "unsound" in the application of the statutory procedure. This information is readily available in the published official reports of the Federal Deposit Insurance Corporation.¹⁸

It will be noted that there are listed 54 types of practices or violations within the scope of this disciplinary statute, embracing every type of operation constituting a hazard to soundness. In the eleven years experience under this provision of the law, however, its administrators have apparently never once considered that the soundness of a bank's operations was

¹⁸Five pages of tables from such reports, reflecting the use of the statutory procedure over a period of eleven years and covering 132 banks, are reproduced for the convenience of the Court at the back of the Appendix to this brief.

affected by the fact that there was a change in the ownership of some of its stock or that some of its stock had been transferred to a stockholder having other interests than banking.

Apart from their alleged desire to protect *the System* from the consequences of the Bank "coming under the domination of a management which the Board considers inimical to respondent's welfare", petitioners go so far in their brief as to suggest that a proper purpose of the Condition was "to protect *respondent*" from such consequences (Pet. Br. p. 10). When it is remembered that the only act within the Bank's power, which would constitute compliance with Condition No. 4, was the act of *withdrawing* from the System, thereby losing its power to perform its statutory functions as a result of losing its Federal Deposit Insurance permanently (through secret agreement between the Board and the F. D. I. C.), the "protection" afforded to the Bank would be analogous to the elimination of disease from a patient by a doctor whose treatment results in the patient's death.

The suggestion that Condition No. 4 was in some way related to a responsibility of the petitioners under the Clayton Act "to carry out a national policy against restraint of commerce and monopolies" (Pet. Br. p. 10), is equally absurd. Petitioners did not see fit to put any facts into the record upon which such an argument might be based but have preferred to set forth a table (Pet. Br. p. 25) taken from the speech of a Congressman reported in the Congressional Record. The table purports to set forth some very general statistics as of December 31, 1943, about two years after the date when the application of Peoples Bank was under consideration by the Board, respecting "Banks and branches in the Transamerica Corpora-

tion group". It does not distinguish between banks *controlled* by Transamerica and those in which Transamerica had only a minority interest. It also does not show the sources of the information.

In case this Court should be interested in some accurate facts and figures respecting the subject matter so discussed in the petitioners' brief, we have set forth in the Appendix to this brief certain data obtained from published sources, the accuracy of which is so generally recognized that it may with propriety be judicially noticed by the Court, indicating the actual competitive situation as of the end of the year 1942, in Los Angeles County in which this respondent bank's office had been opened for business that year.¹⁹ These data show that, in Los Angeles County, respondent was the smallest in terms of deposits and one of the smallest in terms of capital among 36 banks, maintaining a total of 205 banking offices, *in which Transamerica Corporation did not have any interest*. They show in contrast that Transamerica Corporation did have some interest in four banks in Los Angeles County and that all but four of the banking offices in which it had an interest, by way of stock ownership, were branches of Bank of America in which Transamerica's stock interest was about 25%. These statistics further indicate that approximately 35% of the banking deposits and 42% of the banking offices in Los Angeles County were in banks (including Bank of America) in which Transamerica had some stock interest, while approximately 65% of the deposits and 58% of the banking offices were in banks in which Transamerica did not have any interest. They further

¹⁹Rand McNally Bankers Directory, First Ed. 1943; Moody's Manual of Investments, 1943; Walker's Manual of Pacific Coast Securities, 1943 Ed.; Appendix, pp. A-20 to A-21.

show that approximately 97% of the deposits and banking offices in which Transamerica had a stock interest in Los Angeles County were in Bank of America, in which that interest, as previously stated, is only about 25%. In the face of these statistics, the suggestion that the Board thought it necessary to prevent the acquisition of "any interest" in even one share of the stock of the smallest bank in Los Angeles County by Transamerica Corporation in order to prevent "substantially lessened competition" or the creation of "monopoly" (Pet. Br. p. 29) may well be left without further comment.

However, we must again point out that even if some action by the proper authority under the anti-trust laws were appropriate, in spite of the facts and figures referred to, that action should not be taken by the Board against this respondent bank, which is not even alleged to be guilty of violating the anti-trust laws. In a proceeding under the anti-trust laws, the only consequence to respondent bank would be a requirement that some purchaser of its shares divest itself of such ownership,—a far cry indeed from the death sentence upon the Bank which the petitioners, without any hearing on their feigned monopoly issue, would impose pursuant to Condition No. 4.

The petitioners' argument (Br. pp. 26-27), based upon the claimed analogy between the powers of the Federal Communications Commission to make regulations under the Federal Communications Act and the powers of the Board to prescribe conditions upon state banks will be found, upon comparison of the statutes, to be altogether unfounded. The Federal Reserve Act extends to all sound state banks the privilege of joining the Federal Reserve System on an equal basis with all national banks. In contrast, the court in *National* 2

Broadcasting Co. v. United States, 319 U.S. 190, exhaustively reviewed both the Communications Act and the extensive hearings conducted by the Commission under that act preliminary to the promulgation of the regulations there in question. It found many express provisions in the statute giving the Commission authority, in licensing, to provide communities with a "fair, efficient, and equitable distribution of radio service" and to make "special regulations applicable to radio stations engaged in chain broadcasting" (pp. 215, 217).

POINT IV.

THERE IS NO BASIS FOR ANY CLAIM OF ESTOPPEL IN THIS CASE.

In considering the petitioners' claim of estoppel we must assume the illegality of Condition No. 4. If the Act gives the petitioners authority to impose a condition such as Condition No. 4, then it is binding without regard to estoppel, but if, as we believe we have demonstrated, the imposition of the Condition was beyond the statutory authority of the Board, then the petitioners urge this Court to uphold their usurpation of the Congressionally withheld authority because of the respondent bank's initial acquiescence. In other words, petitioners would have this Court declare that a responsible government agency may derive powers of life or death over a citizen, without authorization from Congress, if the citizen once acquiesces in the theory, asserted by the government agency, that it has such power.

We respectfully submit, and the court below has held that such a rule would constitute an unsound perversion of the doctrine of equitable estoppel.

This record is barren of any of the essential elements of estoppel. A leading text writer (3 Pomeroy, Equity Jurisprudence (5th ed. 1941) §805) lists six "essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications". The most important of these are "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. * * * 6. He (i. e., the party to whom the representation is made) must in fact act upon it in such manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it".

Thus, without a misrepresentation or without detrimental reliance, application of a doctrine of equitable estoppel is untenable. See *Ketchum v. Duncan*, 96 U. S. 659, 666; *Hammond v. Tate*, 83 F. 2d 69, 72 (C.C.A. 10th, 1936). We have already pointed out the absence of any misrepresentation by the respondent bank, or anyone in its behalf, in connection with its application for the System membership upon which Condition No. 4 was imposed by the Board. We have also pointed out (*supra*, p. 31) that President Wilson and the Congress, which created the Federal Reserve System, did not attempt to set up the Board "as a dispenser of federal privileges in the banking field" (See Pet. Br. p. 26) but intended and prescribed that all banks, which could meet the minimum requirements of eligibility prescribed in the statute, should be invited to join the System in order to promote "the national welfare". In these circumstances it is

difficult to see where there was either "misrepresentation" or "detriment".

And since it is undisputed that the Bank was and is qualified for membership in the System (Compl. par. V, R. 3, not denied by answer), and that in considering and approving plaintiff's application the Board of Governors took into consideration all factors prescribed by statute (Compl. par. VII, R. 4, not denied by answer), it cannot be seriously suggested that the petitioners or the Board have suffered or can suffer a legal or equitable detriment by being compelled to recognize that which it is their duty under the law to recognize. The conclusion that equitable estoppel has no application in such circumstances is so abundantly supported by authority that it can hardly be necessary to set forth more than a few references. For example:

"* * * The doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do."

31 Corpus Juris Secundum (1942), Estoppel, §72, p. 276.

"The cases all agree there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action.

"Finally this action must be of such a nature that it would have altered the *legal* position of the party for the worse, unless the estoppel is enforced."

3 Pomeroy, Equity Jurisprudence (5th ed. 1941), §812 (citing numerous cases).

"Estoppel does not arise where the person accepting the benefits is entitled thereto, regardless of the questioned transaction."

Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc., 116 F. 2d 823, 836 (C.C.A., 6th, 1941).

The nearest approach to an estoppel doctrine in the facts of this case is a so-called "promissory estoppel" although that term has not been used by the petitioners. Promissory estoppel is the principle by which courts have upheld the validity of certain types of contracts without proof of consideration in the conventional sense. Indeed, in such cases the detrimental reliance by one party upon the promise of the other party has been said to operate as a "substitute for consideration" or as "the equivalent of consideration". *Allegheny College v. National Chautauqua County Bank*, 246 N. Y. 369, 159 N. E. 173 (1927): "The gratuitous promises will thus be converted into valid and enforceable contracts." *School District v. Sheidley (School District v. Stocking)*, 138 Mo. 672, 40 S. W. 656 (1897).

Illustrations of the situations to which this doctrine has been applied are:

Charitable subscriptions, which have been held enforceable, in spite of the original absence of consideration, if money has been extended or liabilities have been incurred in a reliance upon the promise so that non-fulfillment will cause injury to the payee.

Robinson v. Nutt, 185 Mass. 345, 70 N. E. 198 (1904);

University of Pennsylvania v. Coxe, 277 Pa. 512, 121 Atl. 314 (1923);

Board of Home Missions v. Manley, 129 Cal. App. 541, 19 Pac. 2d 21 (1933).

A promise not to take advantage of a statute of limitations which induces another to forego his rights and to delay suit until after the expiration of the period of limitation is held to estop the promisor from asserting the statute as a bar to the creditor's action.

Schroeder v. Young, 161 U. S. 334;

Chesapeake & N. Ry. Co. v. Speakman, 114 Ky. 628, 71 S. W. 633 (1903);

W. B. Saunders Co. v. Galbraith, 40 Ohio App. 155, 178 N. E. 34 (1931).

The essential basis for the doctrine of promissory estoppel is the avoidance of "injustice". As stated by 1 Williston, Contracts (Rev. Ed. 1936), p. 502, §139:

"There would seem, however, compelling reasons of justice for enforcing promises, where injustice cannot be otherwise avoided, when they have led the promisee to incur any substantial detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise."

The real basis of the doctrine was well stated by the California court in *Bank of America v. Pacific Ready-Cut Homes, Inc.*, 122 Cal. App. 554, 10 Pac. 2d 478 (1932), where it was stated (10 Pac. 2d at 482):

"It is the general rule that, in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future. *Promises as to future conduct or performance, if binding at all, must be binding as contracts.*"

The so-called "estoppel" defense then proves to be not a defense of "estoppel" at all. Its sole support is the admitted acceptance of Condition No. 4 by the Bank. The Bank agreed to the condition, of course. But that did not create an "estoppel". The most that could be said is that a contract resulted, which the courts are asked, in effect, to enforce specifically regardless of the lack of power to enter into it and regardless of its wholly inequitable and discriminatory consequences.

Thus we are brought right back to the basic questions: Do we have the elements of an enforceable contract? Did the petitioners have power to exact such a contract? Did the Bank have power to make such a contract validly? Will it avoid, or promote, "injustice" to compel the Bank to give up a valuable status for which it is admitted to be fully qualified and eligible?

The "estoppel" argument has not advanced us one inch toward the answers to those questions. It has merely distracted the court's attention temporarily from the real problem of illegality.

The learned Court of Appeals in the opinion now subject to review recognized the soundness of these arguments and at the same time distinguished the authorities relied upon at pages 36-40 of petitioners' brief in the following language (R. 132):

"Obviously the principle announced in these two cases, which is the same rule found in the other Supreme Court decisions cited by the appellees, does not apply where the litigant charges that the administrative body has exceeded the authority conferred upon it by a statute, but does not attack the validity of the statute.

"Whether estoppel has arisen, whether waiver has occurred, depends entirely upon whether Condition No. 4 is valid or invalid. No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it."

As the court below realized, we are not here seeking to question the constitutionality of the Federal Reserve Act. We seek to have the Act administered and applied as written. It is our specific contention that the imposition of Condition No. 4 was unwarranted by the statute and constituted an unauthorized assumption of power by the Board. It is only the latter that we wish to avoid.

The case of *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 282 U. S. 311, seems to bear the closest analogy to the situation involved in this case. The *St. Paul* case involved the validity of a condition imposed by the Interstate Commerce Commission incidental to the authority granted by it to the railroad company to issue securities to take over the assets of a corporation in receivership. The condition attempted to control the disbursement of reorganization expenses incurred by the old corporation in connection with the reorganization plan. The particular condition was held to be beyond the power of the Commission to impose, since it did not relate to the regulation of commerce. The government contended that since the railroad company had accepted the grant of

authority to issue securities and had acted upon that grant, it could not question the validity of a condition which was a part of the grant. This Court, however, held otherwise and set aside the condition as invalid and enjoined its enforcement. In connection with the validity of the condition, the court used the following language which is particularly pertinent to this case (282 U. S. at p. 324):

“By subdivision (3) of §20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard, *Union Bridge Co. v. United States*, 204 U. S. 364, 384-385) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities.”

The government's contention that the condition, though invalid, could not be set aside because the grant had been accepted and acted upon, is strikingly similar to the claim of estoppel asserted by the defendants here and was disposed of in the following language by the court in the *St. Paul* case (282 U. S. at p. 328):

“The contention of the government is that the authority to enjoin an order in part, applies to a severable part of the order, but not to a condition upon which the order was issued after the carrier has exercised the authority granted by the order. No pertinent authority is cited in support of this contention, and none has been called to our attention. A condition contained in the order by which

the grant is limited is as much a part of the order as any of its substantive provisions, and if beyond the jurisdiction of the commission is not ratified by an acceptance of the valid part of the order. It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

We have been unable to discover any case in which the holding in the *St. Paul* case, to the effect that the acceptance of a grant does not preclude the grantee from attacking the validity of conditions attached to the grant, has been criticized or questioned. There appears to be no later authority either for or against that proposition. The *St. Paul* decision is the only authority, as to the effect of an invalid condition upon an order to which it is attached, cited by Pike & Fischer in their currently revised reference work, *Administrative Law*, Vol. 2, page 136.

There was in the *St. Paul* case a dissenting opinion by Mr. Justice Stone, from which petitioners have quoted (Pet. Br. p. 37, fn. 18); but a reading of it will show that the instant case is not even within the principles of the dissent. Justice Stone says (282 U. S., at p. 341):

*"If appellee were unable or unwilling to comply with the order as made, equity and good conscience required, at least, either disclosure of that fact to the District Court before securing the transfer of the railroad property to it; * * * or prompt initiation of the present proceedings to test the validity of the order before a situation had been created*

prejudicial to the public interest and to the Commission's performance of its duties."

That is exactly what the Bank in the instant case did. As soon as the Bank learned that a situation had been created by these petitioners, whereby compliance by it with the invalid condition would have a ruinous effect upon its business, because of a non-insurance commitment previously unknown to it but known to the petitioners and because the condition involved a "policy" which the petitioners later admitted they had no power to enforce, it promptly brought proceedings to have its invalidity determined. Up to that time, and even much later, there had been no possible prejudice suffered by the Board or the System (See Board resolution Jan. 28, 1946, R. 11) and the existing membership continued to be mutually advantageous. In no view of the law applicable in the instant case, therefore, can it be said that there was any failure on the part of the Bank to conform to "elementary standards of fairness and good conscience" (Stone, J., 282 U. S., at p. 342).

The dissent also objected that the judgment "precludes any future action by the Commission in the performance of its statutory duty" (282 U. S., at p. 343). Not so in the case at bar, for the Bank would be subject to every law and regulation applicable to it and to all other banks and to all powers conferred upon the Board.

Closely analogous also are the numerous decisions of this Court that a foreign corporation, by seeking and receiving authority to do business in a state, is not thereby estopped from attacking provisions of the state statutes which impose conditions on the right of foreign corporations to do business and which are

invalid because they are repugnant to the provisions of the Constitution of the United States.

Western Union Telegraph Co. v. Kansas, 216 U.S. 1;

Terrall v. Burke Construction Co., 257 U.S. 529;

Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426;

Fröst Trucking Co. v. Railroad Commission, 271 U.S. 583;

Hanover Fire Insurance Co. v. Harding; 272 U.S. 494.

This principle is clearly stated in the leading case of *W. W. Cargill Co. v. Minnesota*, 180 U.S. 452, at page 468, as follows:

"The defendant however insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions; and (in the same words of the statute) 'thereby to have agreed to comply with the same.' § 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repugnant to the Constitution of the United States."

These cases stand unchallenged today.

In addition to repeating the citations of the cases which were distinguished in the opinion of the court below petitioners have also relied upon the recent decision of this Court in *Fahey v. Mallonee*, 332 U.S. 245. But that case, like the others relied upon by the petitioners, involved a regulation plainly within the

statutory authority of the administrative agency in question. By petitioners' own statement (Br. p. 38) there was an effort to challenge "the validity of this section".

In contrast this Bank attacks the *illegality of the action of appointed government officials* who have imposed a condition which is contrary to the provisions of the applicable statute. The validity of the statute is not questioned in this case.

Petitioners also rely wrongly upon the decision of the First Circuit Court of Appeals in *White Star Bus Line, Inc. v. People of Puerto Rico*, 75 F. 2d 889 (1935), with the opinion in which petitioners say "the court below seemingly disagrees (R. 132)" (Pet. Br., p. 40). Although it may be fair to say that the court below disagreed with the dictum of the First Circuit in that case, certainly it is not necessary to disagree with the holding. That case involved a bus franchise which was held by the court to partake of the nature of a contract between the grantee and the grantor. One who has obtained advantages in this bargaining process may well be precluded from questioning the authority or power of the other contracting party respecting particular items. As is pointed out earlier in this brief, however, there is no statutory provision anywhere for *contracts* with respect to Federal Reserve membership. Such is contrary to the whole scheme of the Federal Reserve Act. Congress has set the pattern and declared all eligible banks to be entitled to membership.

The facts do not support estoppel.

It is undisputed *now* that these petitioners have entered into an agreement with the Federal Deposit

Insurance Corporation respecting the "policy" which resulted in the prescription of Condition No. 4 (R. 63-67, 69-70, 72-73, 82-85). It is equally undisputed *now* that in the process of developing this "policy" the Federal Deposit Insurance Corporation indicated to the petitioners "its unwillingness under existing circumstances to insure * * * any bank in the (Transamerica) group which may withdraw from the Federal Reserve System" (R. 84).

Yet it appears that *at the time when Condition No. 4 was imposed* upon the Bank the petitioners did not disclose to the Bank and the Bank was not aware of this secret agreement which would have the necessary effect of depriving the Bank *permanently* not merely of its Federal Reserve membership but also of its federal deposit insurance in the event that Condition No. 4 should ever be enforced (R. 31-32, 49-50, 53-54, 58-61, 61-62, 62-68, 82-85). It definitely appears that the Bank was not informed of this most important incident of Condition No. 4 until March 24, 1944, nearly two years after its admission to membership in the System and that the Bank immediately authorized the institution of legal proceedings to determine the legal effect of the condition and has been protesting against the condition with all the vigor at its command ever since (R. 31-32). It is also undisputed that Transamerica Corporation protested against the petitioners' "policy" announcement of February 14, 1942 immediately after its receipt (R. 64, 70-72). In Mr. Andrews' letter to the Board of Governors dated March 17, 1942, he stated in part "it (Transamerica) cannot, on the basis of its present understanding of the statutes, accept such a ruling on behalf of itself or any bank in which it owns any interest." (R. 71.)

It would be stretching the doctrine of estoppel to unprecedented length to hold that the Bank is legally barred from protesting against the invalidity of a condition which, without its knowledge, was to operate as a part of an uncommunicated agreement with third parties to deprive the Bank of federal deposit insurance,—*an agreement which remained unknown to the Bank for two years after it is alleged to have waived the right to object to it.*

Even in a situation where "estoppel" can be created by agreement (which we have previously shown cannot be done where the party seeking the benefit of the estoppel is a public official attempting to enforce regulations or conditions unauthorized by his statutory authority), it is established that there can be no estoppel in the absence of a meeting of the minds of the parties upon all the relevant facts. See: *Leathem Smith-Putnam Nav. Co. v. National Union Fire Ins. Co.*, 96 F.2d 923, 928 (C.C.A. 7th, 1938).

Equitable estoppel is at most an instrument for the avoidance of injustice. It cannot properly be invoked to perpetuate injustice. *American Law Institute, Restatement of the Law of Contracts* (1932), p. 110, § 90.

POINT V.

THERE IS NOTHING EITHER HYPOTHETICAL OR PREMATURE ABOUT THE RESPONDENT BANK'S RESORT IN THIS PROCEEDING TO ITS ONLY AVAILABLE DAY IN COURT FOR JUDICIAL REVIEW OF AN ILLEGAL ADMINISTRATIVE DEATH SENTENCE.

Keeping in mind the real nature of the controversy, and laying aside controversies feigned by the petitioners, the carefully reasoned and exhaustive

opinion of Justice Holtzoff in the District Court (R. 11-23) clearly demonstrates that the case is justiciable. The petitioners, however, have repeated their twice overruled contention of non-justiciability as the last point of their brief in this Court (Pet. Br. pp. 40-41).

The principal authority relied upon by petitioners in this connection is *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, which is cited for the proposition that the pronouncements, policies and programs of administrative agencies do not give rise in themselves to justiciable controversies *except* as they have "fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." We do not disagree with counsel's statement of this general principle, but we respectfully direct the attention of the court to the sentence in its opinion in the *Ashwander* case which immediately preceded that quoted by petitioners. In defining "the scope of the issue", this Court there said (297 U. S. at p. 324):

"We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934."

That contract was regarded by the court as action of a concrete character which constituted an actual or threatened interference with the rights of the person complaining and was examined as such. It is, however, no more definite or concrete as applied to the persons seeking declaratory relief in that case than Condition No. 4 is definite and concrete as applied to the respondent in the instant case. The court in the *Ashwander* case in determining the validity of the contract went to greater lengths than it is necessary

to go in this case and ruled on the constitutionality of the act pursuant to which the contract was made, whereas here the invalidity of the condition may be determined by examining the statutory powers of the Board. The case is clear and strong authority in support of our contention that a justiciable controversy is presented.

As pointed out by the court in *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995 (S.D. Cal. 1940) at p. 1008:

"* * * I can conceive no good reason for not relieving a citizen of a threat of official action resulting from his relation to a governmental agency.

"A declaration of non-liability as applied to such a relationship is, if at all, more important in these days of expansion of governmental frontiers, than a similar declaration as to contractual relations."

As for the petitioners' amazing suggestion (Pet. Br. p. 41) that "the record" (no citation of authority being given) "indisputably shows that the Board has neither acted nor threatened to act under the Condition", surely the court may assume that a great government agency would not impose such a condition without a serious purpose to enforce it. What more is needed than the condition and its breach? However, we respectfully refer the court to the additional threat contained in the language of the Board's letter announcing the approval of the Bank's membership application on May 6, 1942 (R. 58-61, especially note first paragraph, p. 60),—a threat which was repeated and reemphasized by a letter written by the defendant Eccles to Mr. A. P. Giannini on November 13,

1942 (R. 82-85); again by the Board's official decision to ignore the formal demand made on December 4, 1945 for cancellation of Condition No. 4 (Complaint, par. XIV, R. 7); again by the resolution formally adopted by the Board of Governors on January 28, 1946, which was predicated upon the assumed validity of Condition No. 4 and the intention of the petitioners to enforce it at will (R. 10-11), and finally by the petitioners' vigorous assertion in this Court that Condition No. 4 is valid, that at any time now "the Board would feel free to invoke the Condition without the necessity of making any additional finding such as that required by the lower court" (Pet. Br. p. 32), and that the petitioners have an alleged statutory right, by means of the condition, to deprive the Bank of its Reserve membership and deposit insurance whenever they deem it desirable to do so. It cannot be denied that these threats are presently harmful to the Bank and will continue to be so until declaration of their validity or invalidity is judicially made. The seriousness of the impending harm is alleged in the complaint (par. XIV, R. 7) and strongly supported by the affidavits of Mr. Brewer, the president, and Mr. Luddy, a director of the Bank, who acquired his stock without knowledge of Condition No. 4 (R. 106-110).

Respondent is a relatively new bank, in a rapidly growing section of the country. Its present and continuing need of new capital for the proper expansion of its business must be assumed. Yet who would wish to invest additional money in the capital stock of this bank, while it is subject to termination of its Reserve membership and its federal deposit insurance (with

consequent double liability on stockholders²⁰) on sixty days' notice at the mere whim of six men who have imposed a restriction upon this bank which has never been imposed upon any other bank anywhere and compliance with which is completely beyond the power of the bank or its directors or stockholders to control? How can a bank, subject to such a condition, attract able men as new officers when its very existence may be terminated at any time? How do the bank's officers dare make normal banking commitments for banking premises, or facilities, or employment contracts, or loans, or investments? What explanation can a bank officer make to a depositor who hears of this condition and demands assurances of the bank's continuation of membership in the Federal Reserve System and the continued benefits of federal deposit insurance? How can a bank, subject to such a condition, be expected to compete on equal terms with other banks not subject to the condition?

As Mr. Justice Holtzoff stated, "to say that no actual controversy exists between the parties" as to Condition No. 4 "is not realistic" (R. 21).

The majority opinion of the Court of Appeals of the District of Columbia disposed of petitioners' non-

²⁰The market value of stock in the Bank is obviously depressed by the possibility of a notice to withdraw given by the Board under Condition No. 4, for, among other things, the California statute (1 Deering's California General Laws (1944 ed.), Act 652a, §1; Stats. 1931, p. 338; Amended by Stats. 1937, p. 627) provides for double liability of shareholders of a state bank except with respect to shares in a bank whose deposits are insured by the Federal Deposit Insurance Corporation pursuant to the Federal Reserve Act as amended.

justiciability contention in the following language (R. 132-133):

"We need not elaborate upon the opinion of the learned justice of the ~~District Court~~ (Justice Alexander Holtzoff in *Peoples Bank v. Eccles*, 64 F. Supp. 811) which rejected that contention in denying the appellees' motion to dismiss the complaint. The resolution of January 28, 1946, disclaiming an immediate purpose to enforce Condition No. 4, protected the bank from literal enforcement of the condition only on that day; for the appellees argue in this court that enforcement is 'now justified by the facts,' although the resolution has not been rescinded, and a different one has not been adopted.

"To those acquainted with the realities of banking, it is plain that public knowledge in the bank's service area of the existence of Condition No. 4 does incalculable harm to the bank. It is generally realized that nothing could more quickly cause depositors to lose confidence in a banking institution than withdrawal of federal deposit insurance. It is equally true that the confidence of depositors is undermined and weakened when they know that their insurance may be withdrawn on short notice, without a hearing, and for a cause having no relation whatever to the safety of their deposits. In such circumstances a positive threat by the Board to enforce the condition is not necessary to do the harm. The threat is implicit in the condition itself, and the harm is present and continuing, due to the mere existence of the condition."

CONCLUSION.

For the foregoing reasons, the decision of the Court of Appeals that Condition No. 4, as written, is invalid should be affirmed, and this Court should direct the entry of a declaratory judgment to that effect.

Dated: December 1, 1947.

Respectfully submitted,

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(Appendix Follows.)

Appendix

EXCERPTS FROM FEDERAL RESERVE ACT.

SECTION 9. STATE BANKS AS MEMBERS.

1. *Applications for membership by State banks*

SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank. (12 U. S. C. § 321)

2. *Branches of State member banks*

Any such State bank which, at the date of the approval of this Act, has established and is operating a branch or branches in conformity with the State

law, may retain and operate the same while remaining or upon becoming a stockholder of such Federal reserve bank; but no such State bank may retain or acquire stock in a Federal reserve bank except upon relinquishment of any branch or branches established after the date of the approval of this Act beyond the limits of the city, town, or village in which the parent bank is situated. *Provided, however,* That nothing herein contained shall prevent any State member bank from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by national banks except that the approval of the Board of Governors of the Federal Reserve System, instead of the Comptroller of the Currency, shall be obtained before any State member bank may hereafter establish any branch and before any State bank hereafter admitted to membership may retain any branch established after February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated. (12 U. S. C. § 321)

3. Financial condition, management and powers

In acting upon such applications the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this Act. (12 U. S. C. § 322)

* * * * *

8. Forfeiture of membership

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a

member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section. (12 U. S. C. § 327)

9. Voluntary withdrawal from membership

Any State bank or trust company desiring to withdraw from membership in a Federal reserve bank may do so, after six months' written notice shall have been filed with the Board of Governors of the Federal Reserve System, upon the surrender and cancellation of all of its holdings of capital stock in the Federal reserve bank: *Provided*, That the Board of Governors of the Federal Reserve System, in its discretion and subject to such conditions as it may prescribe, may waive such six months' notice in individual cases and may permit any such State bank or trust company to withdraw from membership in a Federal reserve bank prior to the expiration of six months from the date of the written notice of its intention to withdraw: *Provided, however*, That no Federal reserve bank shall, except under express authority of the Board of Governors of the Federal Reserve System, cancel within the same calendar year more than twenty-five per centum of its capital stock for the purpose of effecting voluntary withdrawals during that year. All such applications

shall be dealt with in the order in which they are filed with the board. Whenever a member bank shall surrender its stock holdings in a Federal reserve bank, or shall be ordered to do so by the Board of Governors of the Federal Reserve System, under authority of law, all of its rights and privileges as a member bank shall thereupon cease and determine, and after due provision has been made for any indebtedness due or to become due to the Federal reserve bank it shall be entitled to a refund of its cash paid subscription with interest at the rate of one-half of one per centum per month from date of last dividend, if earned, the amount refunded in no event to exceed the book value of the stock at that time, and shall likewise be entitled to repayment of deposits and of any other balance due from the Federal reserve bank. (12 U. S. C. § 328)

* * * * *

11. *Waiver of membership requirements as to insured banks*

In order to facilitate the admission to membership in the Federal Reserve System of any State bank which is required under subsection (y) of section 12B of this Act to become a member of the Federal Reserve System in order to be an insured bank or continue to have any part of its deposits insured under such section 12B, the Board of Governors of the Federal Reserve System may waive in whole or in part the requirements of this section relating to the admission of such bank to membership: *Provided*, That, if such bank is admitted with a capital less than that required for the organization of a national bank in the same place and its capital and surplus are not, in the judgment of the Board of Governors of the Federal Reserve System, adequate in relation to its

liabilities to depositors and other creditors, the said Board may, in its discretion, require such bank to increase its capital and surplus to such amount as the Board may deem necessary within such period prescribed by the Board as in its judgment shall be reasonable in view of all the circumstances: *Provided, however,* That no such bank shall be required to increase its capital to an amount in excess of that required for the organization of a national bank in the same place. (12 U. S. C. § 329a)

12. *Laws to which subject.*

Banks becoming members of the Federal Reserve System under authority of this section shall be subject to the provisions of this section and to those of this Act which relate specifically to member banks, but shall not be subject to examination under the provisions of the first two paragraphs of section fifty-two hundred and forty of the Revised Statutes as amended by section twenty-one of this Act. Subject to the provisions of this Act and to the regulations of the board made pursuant thereto, any bank becoming a member of the Federal Reserve System *shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State* in which it was created, and shall be entitled to all privileges of member banks: *Provided, however,* That no Federal reserve bank shall be permitted to discount for any State bank or trust company notes, drafts, or bills of exchange of any one borrower who is liable for borrowed money to such State bank or trust company in an amount greater than that which could be borrowed lawfully from such State bank or trust company were it a national banking association. The Federal reserve bank, as a condition of the discount of notes, drafts,

and bills of exchange for such State bank or trust company, shall require a certificate or guaranty to the effect that the borrower is not liable to such bank in excess of the amount provided by this section, and will not be permitted to become liable in excess of this amount while such notes, drafts, or bills of exchange are under discount with the Federal reserve bank. (12 U. S. C. § 330)

SECTION 12B. INSURANCE OF BANK DEPOSITS

5. *Continuance of insurance of member banks.*

(e)(1) Every operating State or national member bank, including a bank incorporated since March 10, 1933, licensed on or before the effective date by the Secretary of the Treasury shall be and continue to be, without application or approval, an insured bank and shall be subject to the provisions of this section. (12 U. S. C. § 264(e))

6. *Member banks entitled to insurance benefits*

(2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided, That in the*

case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Reserve System in the case of a State member bank, and that consideration has been given to the factors enumerated in subsection (g) of this section. (12 U. S. C. § 264(e)).

7. Continuance of insurance of nonmember banks

(f)(1) Every bank which is not a member of the Federal Reserve System which on June 30, 1935 was or thereafter became a member of the Temporary Federal Deposit Insurance Fund or of the Fund For Mutuals heretofore created pursuant to the provisions of this section, shall be and continue to be, without application or approval, an insured bank and shall be subject to the provisions of this section: *Provided*, That any State nonmember bank which was admitted to the said Temporary Federal Deposit Insurance Fund or the Fund For Mutuals but which did not file on or before the effective date an October 1, 1934 certified statement and make the payments thereon required by law, shall cease to be an insured bank on August 31, 1935: *Provided further*, That no bank admitted to the said Temporary Federal Deposit Insurance Fund or the Fund For Mutuals prior to the effective date shall, after August 31, 1935, be an insured bank or have its deposits insured by the Corporation, if such bank shall have permanently discontinued its banking operations prior to the effective date. (12 U. S. C. § 264(f))

8. *Nonmember banks entitled to insurance benefits*

(2) Subject to the provisions of this section, any national nonmember bank, upon application by the bank and certification by the Comptroller of the Currency in the manner prescribed in subsection (e) of this section, and any State nonmember bank, upon application to and examination by the Corporation and approval by the board of directors, may become an insured bank. Before approving the application of any such State nonmember bank, the board of directors shall give consideration to the factors enumerated in subsection (g) of this section and shall determine, upon the basis of a thorough examination of such bank, that its assets in excess of its capital requirements are adequate to enable it to meet all its liabilities to depositors and other creditors as shown by the books of the bank. (12 U. S. C. § 264(f))

9. *Factors to be considered in insuring banks*

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section. (12 U.S.C. § 264(g))

19. *Termination of insurance of nonmember banks*

(i)(1) Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days' written notice to the Corporation, and to the Reconstruction Finance Corporation if it

owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give to the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof. Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order

that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank. (12 U. S. C. § 264(i))

67. *Nondiscrimination*

(y) It is not the purpose of this section to discriminate, in any manner, against State nonmember, and in favor of, national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section. No bank shall be discriminated against because its capital stock is less than the amount required for eligibility for admission into the Federal Reserve System. (12 U. S. C. § 264(y))

EXCERPTS FROM BANKING ACT OF 1933 RELATING TO PENALTIES FOR "UNSAFE OR UNSOUND PRACTICES" IN BUSINESS OF A STATE MEMBER BANK

(As set forth in United States Code, Title 12.)

12 U.S.C. § 77. Removal of director or officer.

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed

from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than five years, or both, in the discretion of the court. June 16, 1933, c. 89, § 30, 48 Stat. 193; Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.

On the reverse side of this sheet is reproduced page 20 from the Annual Report of the Federal Deposit Insurance Corporation for the year ended December 31, 1946.

In July 1946 the Corporation instituted an improved method of examination of mutual savings banks. A description of this method of examination is given in Part Three of this report.

Unsafe and unsound banking practices and violations of law or regulations. During 1946 proceedings were initiated against one insured bank for engaging in unsafe and unsound banking practices and were continued against four other banks. The bank against which proceedings were initiated was charged with continued violation of law to which it was subject, with the maintenance of lax lending and collection policies, and with continued operation in an extended condition and by a self-serving and hazardous management. Of the five cases, corrections were made in two banks; the other three were pending at the close of the year.

The number of banks charged with unsafe and unsound practices since the effective date of the Banking Act of 1935, and the disposition of these cases, are given in Table 5.

Table 5. ACTION TO TERMINATE INSURED STATUS OF BANKS CHARGED WITH ENGAGING IN UNSAFE OR UNSOUND PRACTICES OR VIOLATIONS OF LAW OR REGULATIONS, 1936-1946

Disposition or status	Total cases 1936-1946 ¹	Pending beginning of 1946	Started during 1946
Total banks against which action was taken.....	132	4	1
Cases closed:			
Corrections made.....	28	2	
Insured status terminated, or date for such termination set by Corporation, for failure to make corrections:			
Banks suspended prior to or on date of termination of insured status.....	7		
Banks continued in operation ²	3		
Banks suspended prior to setting of date of termination of insured status by Corporation.....	32		
Banks absorbed or succeeded by other banks:			
With financial aid of the Corporation.....	60		
Without financial aid of the Corporation.....	4		
Cases pending December 31, 1946:			
Corrective program pending.....	1	1	
Recapitalization program pending.....	1	1	
Action deferred pending examination.....	1		1

¹ No action to terminate the insured status of any bank was taken before 1936. In 4 cases where initial action was replaced by action based upon additional charges, only the later action is included.

² One of these suspended 4 months after its insured status was terminated.

Back data—See the following Annual Reports of the Corporation for 1945, p. 22.

Approval of banks for insurance. During 1946 the Corporation approved the applications of 157 banks for admission to insurance. Of these, 109 were new banks, including one which reopened after having been inactive and six which succeeded branches of other banks. The remaining 48 banks approved for insurance consisted of thirty banks or successors thereto which were operating as noninsured banks at the beginning of the year and eighteen insured banks which obtained new charters or withdrew from the Federal Reserve System and applied for

On the next succeeding four pages are reproduced pages 246, 247, 248 and 249 from the Annual Report of the Federal Deposit Insurance Corporation for the year ended December 31, 1940.

	Total
Number of banks ¹	97
Disposition as of December 31, 1940:	
Corrections made	15
Insured status terminated for failure to make corrections ²	5
Banks suspended ³	34
Banks absorbed, succeeded, or reorganized ⁴	28
Action deferred pending consummation of recapitalization or merger plans	4
Correction period provided by law not expired	1
Further proceedings otherwise deferred	2

¹ No action to terminate insured status of any bank was started before 1936. In 3 cases where the latter action is included.

² In the case of 2 banks against which action was started in 1939 and of 17 banks in 1940, resolutions were formally adopted by the Board of Directors of the Corporation, but the sending of statements to the

³ One of these 3 banks suspended 4 months after its insured status was terminated.

⁴ The date for official termination of insured status was set in 5 of these cases, but was not effective.

⁵ In all except 1 of these 35 cases, the Corporation made loans to facilitate the mergers or reorganiza-

Table 176. UNSAFE OR UNSOUND BANKING PRACTICES AND VIOLATIONS OF LA
INSURED STATUS WAS STARTED AGAINST 97 INSURED BANKS, AU

Type of practice or violation	Total	
	1936	1937
1. Capital:		
(a) Continued operation of bank with seriously impaired capital	79	
(b) Continued operation of bank although insolvent	9	
(c) Continued operation of bank with inadequate capital	12	
(d) Other practices or violations:		
Failure to take means suggested by examiners for restoration of capital	2	
Reduction of capital without approval of the Corporation	1	
2. Management and general practices:		
(a) Maintenance of lax credit, loaning, and collection policies	66	
(b) Continued carrying of losses in bank's assets, thereby failing to disclose true statement of condition	63	
(c) Continued operation of bank by weak, hazardous, untrustworthy, or incapable management	53	
(d) Maintenance of lax investment policies	29	
(e) Unwarranted and excessive loans to directors, officers, employees, and their interests	27	
(f) Failure to observe recommendations to remedy objectionable practices or conditions	13	
(g) Deliberate misrepresentation of examination records to the		

FEDERAL DEPOSIT INSURANCE CORPORATION

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Number of banks against which action was started in— ¹				
1936	1937	1938	1939	1940
22	25	12	19	19
10	8	1	1	
1	2			
9	14	6	4	1
2	6	4	14	12
		1		3
				1
				2

Initial action was replaced by action based upon additional charges, only relative to unsafe or unsound practices or violations of law or regulations the appropriate supervisory agencies was indefinitely delayed.

before the banks suspended.
liquidations.

W OR REGULATIONS UPON WHICH ACTION TO TERMINATE
AUGUST 23, 1935, TO DECEMBER 31, 1940

Number of banks engaging in practice or violation¹

Action started in—				
1937	1938	1939	1940	
13	18	10	19	19
2	4	2	1	
	2		5	5
1	1			
1				
19	18	10	12	7
9	15	9	12	15
8	15	10	13	7
6	5	2	9	7
8	7	5	3	4
5	5		1	

SUPERVISORY ACTIONS BY THE CORPORATION

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Table 176. UNSAFE OR UNSOUND BANKING PRACTICES AND VIOLATIONS OF LAW OR REGULATIONS UPON WHICH ACTION TO TERMINATE INSURED STATUS WAS STARTED AGAINST 97 INSURED BANKS, AUGUST 23, 1935, TO DECEMBER 31, 1940—Continued

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Type of practice or violation	Number of banks engaging in practice or violation ¹					
	Total	Action started in—				
		1936	1937	1938	1939	1940
(h) Other practices or violations:						
Operation without legally constituted Board of Directors.....	2	1	1			
Failure of cashier to comply with instructions of Board of Directors.....	1	1				
Failure of Board of Directors to make examinations as required by State law.....	1			1		
Failure to call annual meetings of stockholders.....	1	1				
Failure of Board of Directors to supervise management properly.....	1	1				
Failure of Board of Directors to attend regular meetings or to comply with bank's by-laws.....	3	1	2			
Failure to bond employees properly and to collect under surety bond.....	7	4	2		1	
Continued employment of cashier known to have committed gross irregularities.....	2	1	1			
Excessive salaries and improper diversion of funds for personal uses.....	2	2				
3. Loan and investment practices:						
(a) Excessive volume of past due or nonincome-producing loans.....	45	8	11	7	13	7
(b) Failure to obtain and maintain current and adequate credit data and financial statements, and failure to secure appraisal and supporting documents on other real estate owned.....	41	12	17	8	8	1
(c) Unwarranted and excessive extensions of credit in violation of law.....	25	12	14	6	2	1
(d) Continued carrying of unwarranted and excessive amounts of other real estate owned and potential other real estate.....	42	4	2	9	17	10
(e) Excessive volume of loans in Classifications II and III.....	24	9	10	11	2	2
(f) Excessive volume of assets in Classifications II and III or generally unsatisfactory asset condition ²	29	3	3	2	12	12
(g) Excessive volume of loans in Classification IV ³	23	4	12	10	5	2
(h) Excessive volume of assets in Classification IV ³	31		5	2	12	12
(i) Excessive investment in substandard, speculative, and defaulted securities.....	10	2	2		4	2

FEDERAL DEPOSIT INSURANCE CORPORATION

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(j) Unwarranted and excessive volume of nonincome-producing assets	15	1	2	7	5
(k) Progressive deterioration of assets	16		1	5	12
(l) Habitual granting or unwarranted payment of overdrafts	13	5	6	2	
(m) Continued frozen or extended position of loan portfolio	12	7	4	1	
(n) Carrying of other real estate owned in excess of maximum time permitted by law	8		3	3	1
(o) Unwarranted and excessive concentrations of credit	6		3	1	2
(p) Other practices or violations:					
Severe losses sustained and previously written off	2			2	
Investment and retention of assets in contravention of existing laws or regulations	1				1
Unwarranted and excessive liability in connection with a certain property	1				1
4. Miscellaneous:					
(a) Failure to maintain adequate bank records, continuance of inaccurate accounting procedures, and negligence in operating methods	14	9	5		
(b) Poor or rapidly declining earnings	13		2	4	7
(c) Payment of interest on time deposits in violation of regulations	13	3	7	3	
(d) Unwarranted or illegal payment or declaration of dividends or interest on capital	8	2	2	3	1
(e) Unsatisfactory administration of trust department or unauthorized or illegal investment of trust funds	6		2	2	2
(f) Other practices or violations:					
Continued borrowings, and large amount of assets pledged as collateral security to borrowings	2		2	1	
Failure to maintain legal reserves	2	2			
Low liquidity ratio	4		3	1	
Unwarranted amount of public funds on deposit in proportion to net quick assets	2	2			
Not carrying on type of banking prescribed in its charter or permitted by State law	1		1		
Failure to maintain adequate reserves	1			1	
Acceptance and carrying of public funds without complying with State law	1		1		
Negligent payment of certificates of deposit or of checks drawn against fictitious balances	2	1	1		
Failure to depreciate fixed assets property	1			1	
Unwarranted and improper disbursement of bank's funds	1	1			
Unwarranted increase in salaries of officers and employees	2	2			
Unauthorized allocation of funds and credits to the payment of personal obligations of officers	1	1			

¹ Most of the banks engaged in several practices or violations. For the number of banks against which action was started each year, see Table 175.

² For method of classifying assets, see Explanatory Note to Part V, pages 86-87.

**Deposits, Capital and Surplus, and Number of Offices of All Banks Operating in Los Angeles County as of
December 31, 1942, as Ascertained from Rand McNally Bankers Directory, First Edition 1943.
(Transamerica's Interests Are as Ascertained from Moody's Manual of Investments, 1943,
and Walker's Manual of Pacific Coast Securities, 1943 Ed.)**

Name of Bank	Los Angeles County Deposits (000.00 Omitted)	Total Capital and Surplus (000.00 Omitted)	Number and Percentage of Banking Offices Located in Los Angeles County (100% except where otherwise noted)
Banks in which Transamerica had no interest:			
1. California Bank	\$206,222	\$ 8,500	44
2. Citizens National Trust and Savings Bank	195,651	8,350	33
3. Union Bank and Trust Company	64,197	4,750	1
4. Farmers and Merchants National Bank	202,853	7,500	1
5. Security First National Bank of Los Angeles	637,122*	48,000	89—(79%)
6. Broadway State Bank	1,961	144	1
7. Canadian Bank of Commerce	9,995*	1,625	1—(50%)
8. Azusa—Valley Savings Bank	1,059	100	1
9. First National Bank of Azusa	1,677	155	1
10. First National Bank of Bellflower	4,150	200	1
11. Beverly Hills National Bank and Trust Company	4,159	300	1
12. Burbank State Bank	2,110	128	1
13. Citizens National Bank of Claremont	1,379	113	1
14. Compton National Bank	2,689	140	1
15. Covina National Bank	1,706	100	1
16. The Southern County Bank	1,931*	208	2—(50%)
17. First National Bank at Glendale	4,915	240	2
18. Hollywood State Bank	6,206	295	1
19. Peoples Bank—Lakewood Village	897	112	1
20. First National Bank—Laverne	1,140	84	1
21. Farmers and Merchants Bank of Long Beach	28,456	1,250	3
22. Western Bank—Long Beach	4,597	379	1
23. Citizens Bank—Monrovia	1,250	125	1
24. Norwalk Commercial and Savings Bank	1,100	102	1
25. Citizens Commercial Trust and Savings Bank—Pasadena	7,371	630	1
26. First National Bank of Lamanda Park	1,830	55	1
29. First National Bank—Pomona	10,325	542	1
30. First State Bank—Rosemead	1,426	97	1
31. Fishermen and Merchants Bank—San Pedro	2,546	175	1
32. Santa Monica Commercial and Savings Bank	4,203	265	1
33. Sierra Madre Savings Bank	1,148	100	1
34. Torrance National Bank	1,414	120	1
35. First National Bank—Vernon	2,861	350	1
36. Whittier National Trust and Savings Bank	6,216	455	1
	\$1,437,191	\$66,423	205

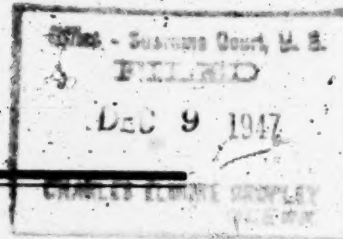
Name of Bank	Los Angeles County Deposits (000.00 Omitted)	Total Capital and Surplus (000.00 Omitted)	Number and Percentage of Banking Offices Located in Los Angeles County (100% except where otherwise noted)	Per Cent of Stock Held by Transamerica
Banks in which Transamerica owned Common and/or Preferred Stock:				
1. Farmers and Merchants Bank of Watts.....	\$ 2,057	\$ 160	1	41.8
2. First Trust and Savings Bank of Pasadena...	21,301	1,563	2	65.3
3. Temple City National Bank.....	1,295	62	1	77.3
4. Bank of America	749,981*	121,216	143—(29%),	25.05**
	<u>\$774,634</u>	<u>\$123,001</u>	<u>147</u>	

*All 40 banks, except the 4 banks which refer to this note, have all their offices in Los Angeles County. The percentage figure shown, representing the proportion of total offices of the 4 exceptions in Los Angeles County, has been applied to the total deposits shown in the Rand McNally directory for each of those 4 banks to produce the estimated Los Angeles County deposit figure in each of those cases. The statewide deposit totals shown by the directory for those 4 banks (000.00 omitted) are:

Security First National	\$ 806,484
Canadian Bank of Commerce.....	19,990
The Southern County Bank.....	3,862
Bank of America	2,586,140

**Represents 17.3% of common stock and 91.2% of preferred stock.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 101.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK, JOHN
K. MCKEE, ERNEST G. DRAPER AND RUDOLPH M. EVANS,
Petitioners,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia.

RESPONDENT'S REPLY BRIEF.

✓ SAMUEL B. STEWART, JR.,
✓ LUTHER E. BIRDZELL,
Attorneys for Respondent.

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PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia.

RESPONDENT'S REPLY BRIEF.

In their Reply Brief, filed on the eve of argument, Petitioners have revived a contention omitted from their main brief and which we had thought abandoned following our demonstration of its unsoundness in the lower courts,—the contention that Peoples Bank could have prevented the acquisition of “any interest in such bank” (the contingency which brought Condition No. 4 into operation) “by the sim-

ple expedient of adopting a by-law limiting such disposition to meet the requirements of the Condition." (Pet. Reply Br. p. 2.)

Petitioners' desperate eleventh hour reassertion of this abandoned contention indicates their agreement with our view that the Board is not authorized by the statute to impose any condition of membership based upon a contingency which is beyond the control of the Bank. It also requires a restatement of our answer to the contention.

A text authority is cited in support of the suggestion which shows the authorities to be divided upon the validity of restrictive by-laws applicable to transfers of corporate stock in furtherance of some corporate policy, no California case being cited either way. Obviously this is not an inviting prospect, especially when the nature of a by-law to meet the broad requirements of this condition is considered. They would not be met by a by-law which would merely restrict the transfer, for the condition restricts ~~the acquisition~~, directly or indirectly, of any interest in such bank. It even purports expressly to require Bank of America or Transamerica or any unit of the Transamerica group, or any holding company affiliate of any subsidiary to obtain the written consent of the Board before making any loan to any person for the purpose of acquiring bank stock if it should result in the acquisition of any interest in this bank. We do not know how or whether we could induce strangers so to conduct their business. It seems to us that this should come more properly within the jurisdiction of the Board if it has such power, for both Transamerica and Bank of America are subject to its legal supervision.

We confess our inability, as we did in the court below, to draft any by-law which would meet the requirements of this condition and still be valid according to any known authority. Petitioners have not answered this dilemma by suggesting the form which such a by-law might take. Doubtless if they had been able to concoct such a form they would have submitted it with their other requirements to Peo-

ples Bank and its stockholders in April, 1942, and *then*, no Condition No. 4 would have been necessary. It must be remembered that the condition is much broader than the commitments the shareholders were required to sign preliminary to the admission of the bank to the System (R. 58). The stockholders were not requested by the Board to restrict their right to sell or pledge their stock in the future, and since, by that date, the stock was all issued and paid for, it was too late for the Bank to force them to give up the property rights they had already acquired.

Moreover, any form of by-law which might have been conceived by either the Bank or the Board in an effort to meet the situation, before it was too late, would have had to satisfy the requirement of the California statute cited by petitioners (Pet. Reply Br. p. 3) that "special qualifications", "not in conflict with law" be provided for "persons who may be shareholders". This statute was obviously designed to meet the situation of corporations which might need stockholders having "special qualifications", and not to provide a means of prohibiting ownership by a named person or group of persons.

This suggestion of petitioners' counsel appears to be just one more desperate tactic of diversion from the central point of the case: that the Board lacked statutory authority to impose Condition No. 4.

Other points discussed in petitioners' reply brief have been adequately considered in respondent's main brief.

Dated, December 9, 1947.

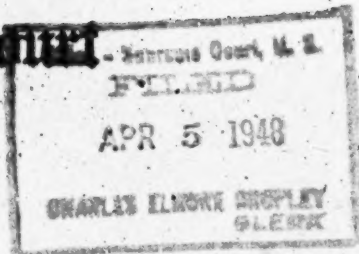
Respectfully submitted,

SAMUEL B. STEWART, JR.,
LUTHER E. BIRDZELL,
Attorneys for Respondent.

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Petitioners,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE,
CALIFORNIA.

On writ of certiorari to the United States Court of Appeals
for the District of Columbia

PETITION FOR REHEARING.

BRIEF IN SUPPORT OF THE PETITION FOR REHEARING.

SAMUEL B. STEWART, JR.,

LUTHER E. BIRDZELL,

300 Montgomery Street, San Francisco 4, California,

Attorneys for Respondent.

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PEOPLES BANK OF LAKEWOOD VILLAGE,
CALIFORNIA.

On writ of certiorari to the United States Court of Appeals
for the District of Columbia

PETITION FOR REHEARING.

Peoples Bank respectfully petitions the Court for a rehearing on the following grounds and for the following reasons:

I.

The decision is based upon statements of fact not supported in the record.

II.

The Court has misconstrued both Condition No. 4 and the policy of the Board and has erroneously disregarded the Board's construction and policy as urged on its behalf in the Court of Appeals and in this Court.

III.

The decision leaves unsettled the question of administrative importance which caused this Court to hear the case.

IV.

The decision is based upon a point not argued orally by counsel on either side, and one of the five concurring members of the Court did not hear oral argument at all.

V.

The disposition is ambiguous, as counsel cannot determine from the opinion whether the Court intended to afford plaintiff an opportunity to supply at a trial the evidence, which is said to be essential (See Opinion, p. 8) to justify a favorable exercise of discretion by the Court, or to deprive plaintiff of such an opportunity.

Dated this 29th day of March, 1948.

SAMUEL B. STEWART, JR.,
LUTHER E. BIRDZELL,
Attorneys for Respondent.

In the Supreme Court
OF THE
United States

—
OCTOBER TERM, 1947
—

No. 101
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**PEOPLES BANK OF LAKEWOOD VILLAGE,
CALIFORNIA.**

BRIEF IN SUPPORT OF THE PETITION FOR REHEARING.

A study of the opinion of the Court has led to the conviction that it is our duty to the Court and to the respondent to petition for a rehearing.

The Court has expressly refrained from holding that the Board of Governors of the Federal Reserve System had power under the statutes to impose the extraordinary Condition No. 4 upon the plaintiff Bank. Though declining to enter a declaratory judg-

ment, it has, however, placed the Board under a moral obligation never to enforce, according to its terms, the condition the Board had prescribed. This is obviously, in effect, a partial adjudication.

It is clear that the Court's conclusions have been influenced by vitally erroneous conceptions of the record and that the end result of the Court's action is to inject needless confusion into a legal situation readily capable of being fully adjudicated. In support of the petition, therefore, we shall first direct the Court's attention respectfully but specifically to the facts.

I.

As illustrative of the importance of the record facts, the Court at pages 7 and 8 of its opinion said:

"We are asked to contemplate as a serious danger that a body entrusted with some of the most delicate and grave responsibilities in our Government will change a deliberately formulated policy after urging it on this Court against the Bank's standing to ask for relief."

And again, the concluding sentence of the Court's opinion says:

"Surely, when a body such as the Federal Reserve Board has not only not asserted a challenged power but has expressly disclaimed its intention to go beyond the legitimate 'public interest' confided to it, a court should stay its hand."

The applicability of the first of these statements to the present case depends upon the Court having before it a clearly and deliberately formulated policy which, if assuredly followed, would protect the rights of the Bank. But, as we shall demonstrate, the Board expressly disavows any such policy.

The second statement loses all of its force if it appears that the Board *has* asserted a challenged power and if it further appears that there is an intent to exercise that power *whether or not* the power be "confided to it." When the Court uses the expression "'public interest' confided to it" and puts the words "*public interest*" in quotation marks, there is a clear implication that the quotation is from the only source of the Board's power—the statutes, for there can be no other source of power. But *those words are not quoted from any statute* conferring any such power on the Board.

Let us now note more specifically certain factual statements in the opinion which are necessarily relied upon as affording validity to the conclusions of the Court.

In its opinion on pages 4 and 5, the Court has deduced from certain correspondence and certain testimony before a congressional committee that, in imposing the condition, the Board "sought to block" Transamerica from the purchase of stock in unit banks, especially in certain cases where Federal agencies have not permitted Transamerica banks to establish branches. If it is of any consequence, there is nothing in this record to indicate that this is such a special case.

We readily agree that the Board in prescribing the condition sought to block Transamerica, but the quoted testimony of Mr. Eccles (Opinion, top of p. 5) has nothing whatsoever to do with the expression of any authorized policy underlying Condition No. 4. Mr. Eccles was testifying concerning the desirability of legislation, which, as he said in that same connection, "*would give* the Board the power to require what they would consider a policy in the public interest." (Hearing before the Committee on Banking and Currency,

House of Representatives, 78th Congress, First Session, H. R. 2634, p. 14.) That is very far from being a statement either that a power *then existed* to block Transamerica by prescribing Condition No. 4, or that a policy of enforcing such power in the public interest had been established. It is clearly inconsistent with the existence of such power. The power is further directly negatived by Mr. Eccles' testimony before the same Committee and at about that same time (78th Congress, First Session, H. R. 1699, p. 133, where he expressly stated that the Board had no power to prevent Transamerica Corporation from purchasing stock of banks and up to that time had never asked for any).

An inadvertent lack of fidelity to a few isolated facts would ordinarily be of little importance, but in this case where facts are marshalled and made to constitute a foundation for judicial action and have become of "decisive importance", inaccuracies are of fundamental significance. Let us illustrate further. On page 6 of its opinion, the Court says that the Bank had always insisted it is independent of Transamerica; that it disclaims any intention to give up its independence; that what it really fears is that under changed conditions it may be required to withdraw from the Reserve System; that the Bank argues that, if this happens, the Comptroller of the Currency has agreed as a Director of the Federal Deposit Insurance Corporation not to insure the Bank; that the Bank seeks a declaration of its rights "if it should lose its independence", etc.

There is a thread of inaccuracy running through every one of these statements:

The "declaration of its rights" which the Bank seeks.

The Bank has never sought a declaration of its rights "if it should lose its independence". It has sought a declaration of *its present right* to maintain membership in the Reserve System and insurance of its deposits on the same basis that every other bank is permitted to maintain them. It seeks to maintain that right against the actual claim in this Court of a *present right in the Board* to terminate the Bank's membership at any time. The Bank has not at any time made any contention or sought to convince the Board or a court that under Condition No. 4 it should not or could not be disturbed so long as its shareholders other than Transamerica Corporation were able to control it. It has been the Bank's consistent contention that it cannot be disturbed legally at all by reason of any circumstances described in Condition No. 4, whether a sale of stock should involve one share or any number of shares. The Bank fully recognizes its responsibility to conduct all of its operations according to law and applicable regulations, but it is its position that whatever supervisory control exists with respect to transactions encompassed by Condition No. 4 must be exercised over the parties to such transactions, and not over the Bank.

The importance of a true understanding of the facts is made most manifest in that part of the Court's opinion on page 5, wherein the Court refers to the Board having "satisfied itself that Transamerica's holding did not affect the Bank's control", and adds: "The Bank had vigorously insisted on its continued independence, in urging upon the Board the harmlessness of Transamerica's ownership of some of the Bank's stock, and the Board, upon independent investigation found such to be the fact." Here it is implied that there had been some sort of a proceeding

before the Board in which the Bank had participated, made such contentions and succeeded in convincing the Board. Nothing of this sort took place at all and we can only infer that the Court has been misled by the Board's resolution (R. 10-11). The reference to action by the Board clearly refers to its resolution of January 28, 1946, which shows that the Board had merely reviewed, in the absence of the Bank, the last regular report of examination made by the Board's examiners. This was used in support of a motion to dismiss which showed that the Board wished to avoid a defense of the legality of Condition No. 4; but when, on a second motion, it had a modicum of success in the District Court, it promptly relied upon the literal meaning of the condition and represented to the Court of Appeals that "the facts now justify action" (see II below).

"Independence".

The only time the Bank has had any occasion to make any representations concerning its independence was when, after the rejection of its application, the Board had indicated its willingness to reconsider and exacted as a condition precedent a showing that neither Transamerica Corporation nor any other bank holding company "has any interest" in the Bank and that every stockholder should give written assurance of no commitments for sale of stock to any such organization and "that they do not intend to enter into any" such agreements. Ultimately Condition No. 4 was worded to penalize the Bank if Transamerica acquired "any interest". "Independence" wherever used in connection with the Bank's application and admission was clearly used to indicate *complete lack of connection, signifying absence of any stock ownership*. (See letter from the Vice President of the Federal Reserve Bank, March 11, 1942, R. 53.)

The Bank did disclaim any *obligation* to Transamerica—it was required so to do—but it never was required to insist upon its “independence” and never did, “disclaim any intention to give up its independence”, if that was something with respect to which the Bank can be said to have had an intention. The stockholders fully complied with this condition precedent. The Board was satisfied without exacting any restraining clause or by-law. Furthermore, there has never been any controversy between the Bank and the Board as to whether the Bank is “independent”. The record shows none.

“What the Bank really fears”.

The Bank is now affected by and is now concerned with the present disadvantages incident to this condition, which have nothing to do with “independence” or lack of it, but stem from Condition No. 4 and the fact that Transamerica Corporation now owns a substantial “interest” in the Bank. The Bank, indeed, is much concerned and presently sustaining provable damages, which are alleged in the complaint and admitted (R. 7-8; 23-24), because, if the Board has the legal right which it claims, it is *empowered* by the condition to forfeit the Bank’s membership now or at any time and without any hearing except upon an admitted fact,—that Transamerica has acquired “any interest”. Any other description in terms of what the Bank “really fears” is inaccurate.* Of course, the

*With respect to the reality of one problem confronting the Bank, the Court has clearly overlooked the following requirement of the Superintendent of Banks in a formal communication of September 24, 1941: (R. 36)

“It is noted from your original application that you proposed to capitalize by selling \$300,000 par value of common

Bank anticipates even greater damage when the forfeiture is actually invoked.

The agreement not to insure.

Mr. Leo T. Crowley, Chairman of the Board of the Federal Deposit Insurance Corporation, and not the Comptroller of the Currency, was the putative spokesman of that Board in regard to the agreement not to insure a withdrawing bank. This agreement, not communicated to the Bank, is an admitted fact. Mr. Crowley had also represented to Congress that the banking agencies, including the Federal Deposit Insurance Corporation, had no way under the law of stopping a holding company from extending its ownership of banks (R. 101). And it has never removed a Bank for that cause (Resp. Br. A 15-19).

II.

"Policy of the Board".

The opinion of this Court attaches great weight to the "policy" of the Board. But in determining that policy it is respectfully submitted that the Court does not attach appropriate importance to various expres-

stock and that you would have a surplus of \$75,000. In a letter dated September 20th, forwarded after a discussion with you and Mr. Martin, we note that it is your desire not [sic, now] to commence business with a paid-up capital of \$100,000 and a surplus of \$25,000. There is no objection on my part to your commencing business at this capital structure and of course from time to time as the Bank Act requires it because of deposit liability or the nature of the business which you may assume commands it, you will increase the paid-up capital and surplus. Therefore, you are authorized to commence business in this territory with a paid up cash capital of \$100,000 and a paid up cash surplus of \$25,000."

sions of the Board's policy which are contained in the record and in the Board's briefs and petition.

Counsel for the Board have strenuously objected *in this Court* to a construction of the January 28, 1946 resolution by the Court of Appeals, the effect of which, they say, is "to emasculate the Condition" (Petitioners' Br., p. 30) and they have resented having their resolution considered as a concession or as a departure from the literal meaning of Condition No. 4. They have admitted it was the primary purpose that the resolution should serve as an aid to their motion to dismiss made in the District Court. They have vigorously protested its use in this litigation as "administratively interpreting Condition No. 4" as being "wholly gratuitous" (Petitioners' Br., p. 31).

The first three specifications of error in our opponents' petition to this Court for a writ of certiorari were based upon the departure of the Court of Appeals from the literal construction of Condition No. 4 and protested a restrictive construction under which the Board would be required to make any other finding than the breach of the condition as literally construed. (See Petition, 5, 14.)

The following two sentences from page 6 of their brief in the Court of Appeals clearly show that, under petitioners' own interpretation of the condition and the facts, the condition is presently broken (emphasis supplied):

"Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced. * * * And in the second place, the Board's failure thus far to take any action under the Condition, *even though now justified by the facts*, is conclusive proof that the

Board did not prejudge the matter* at the time the Condition was agreed upon."

The opinion of the Court of Appeals shows affirmatively that it relied upon this statement. Was it in error in so doing? While there may well be greater reluctance now on the part of the Board to proceed under the condition in view of the advantageous and inconsistent use in this Court of a disclaimer of immediate purpose, the disclaimer and the decision actually operate only to prolong the period of uncertainty and confusion during which the Bank must continue to sustain and endure cumulative damages. As we view it, the Court being unmindful of these phases of the record has mistakenly concluded that the Board has not asserted a challenged power. *Condition No. 4 is an assertion of power* and the Board's refusal to rescind the condition, as respectfully demanded before suit, was a reassertion of power. The legal right of the Board to prescribe it is certainly challenged in the only orderly and practical way it can be challenged under a government where enlightened procedure has been developed to supplant self help—a government in which laws measure the rights of men.

But even putting aside the policy expressions made in the Board's attempt to secure the greatest advantage possible in litigation, and looking alone to its more deliberate expressions, what has the Board said of its policy and the exercise of its power?

An official letter of the Board to Transamerica Corporation written as a formal expression of the Board's policy on the day (February 14, 1942) the first membership application of the respondent Bank was re-

*Clearly the Board had prejudged a cause for expulsion when it prescribed the condition.

jected contained the following: The Board should "under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or *any substantial interest* therein by Transamerica Corporation," (R. 69, 70). An interest of approximately 11 per cent, which Transamerica now owns in the respondent Bank, is a "substantial interest."* Such was the record when the suit was begun.

As an expression of the Board's permanent general policy with respect to restrictions upon the privileges of state member banks, it is believed that the Court should also have taken into consideration one expression which was the most deliberate of all. The Board gave an expression to the Congress, a coordinate branch of the government, actually engaged in the process of enacting legislation. It stated that the Board would not "prescribe any condition of membership which will * * * subject the applying bank to any greater limitations or restrictions than those under which national banks shall operate; because the Board never has and never would prescribe any such discriminatory condition of membership." (See Respondent's Br. p. 34.) Of course, national banks remain member banks after their stock is acquired by holding companies (even by Transamerica Corporation) and there is no possible procedure for forfeiture of their membership rights in the Reserve System for such a cause.**

*The Board has since recommended legislation in which 10 per cent ownership of a bank makes it a subsidiary. § 829 and H.R. 6225, 79th Congress, 2nd Session (April 30, 1946).

**A similar illustration of confessed lack of Board power and of its policy with respect to such conditions of membership is found in the testimony of Honorable Roy A. Young, Governor of the

This record shows plainly that the policy so stated to the Congress has been reversed, for the condition which the Board has imposed on this Bank by way of restriction is applicable "if * * * Transamerica * * * acquires * * * any interest in such Bank * * *." It is undisputed that Transamerica has acquired an interest in such Bank. Even conceding the force of the moral obligation which the Court's opinion casts upon the petitioners to stay the Board's pursuit of the policy expressed in the condition—the legality of which it has vigorously urged—in the absence of a declaratory judgment confirming some such legal limits as were found by the Court of Appeals, all of

Federal Reserve Board, before the same Committee on March 18, 1930. The following is quoted therefrom:

"Under date of May 2, 1927 (sic), Congressman McFadden addressed a letter to the Comptroller of the Currency, suggesting that he adopt administrative measures calculated to control or prevent the growth of chain banking among national banks and sent a copy of his letter to the Federal Reserve Board with the suggestion that the board should adopt similar administrative measures with reference to State member banks of the Federal reserve system. *The board, under date of May 18, 1928 (X-4854) replied that it was powerless under the law to take any such action. The board called attention to the fact that it had suggested legislation along this line, but that Congress had not adopted its suggestions, and also called attention to the fact that Congress in the McFadden Act had amended the law so as apparently to take away the board's power to control this practice through conditions of membership. The Board's letter, a copy of which is attached as Exhibit EE, concluded with the statement that the remedy lies with Congress.*" (Emphasis supplied).

(Statement of Governor Roy A. Young of the Federal Reserve Board before the Banking and Currency Committee of the House of Representatives, U. S. Congress, 71st, Second Session, Hearing under H. Res. 141, March 18, 1930, Vol. I, Part 4, pp. 442-43.)

the parties to this controversy are destined to endure a period of uncertainty respecting valuable rights and important powers readily capable of being judicially and legally defined.*

III.

This Court brought the case up on certiorari because the ruling of the Court of Appeals involved a matter of importance to the administration of the Federal Reserve Act (Opinion p. 3). Yet the Court's decision throws that matter of importance into a state of utter confusion.

Three courts have now attributed three different meanings, interpretations or purposes to a strange and unprecedented condition. The parties appear to be nearer to a common interpretation of the meaning than are the courts, but the parties differ radically as to its validity. As the situation now stands, the last decision of an appellate court on the question of administrative importance is that the Reserve Board lacked the power to impose Condition No. 4. This Court has not discussed the correctness of that ruling. Thus, in the absence of a rehearing and decision on the merits, the Reserve Board is placed in the position of being required either to conform to the now re-

*We leave without discussion that portion of the opinion of the Court which may well be construed to mean that it is the duty of a regulated corporation to adopt voluntarily all by-laws within its legal power and the duty of its stockholders (whether original subscribers or not) to enter voluntarily into whatever agreements will best carry out any policy the regulating agency may prescribe. Such appears to be the dictum without regard to whether there is lawful authority to prescribe the policy and in the face of an uncriticized determination by the Court of Appeals that the policy under consideration is illegal. (See Opinion p. 7).

versed decision of the Court of Appeals with respect to the limits of its power, or, in the alternative, to jeopardize the valuable property rights of Peoples Bank, its stockholders and its depositors by action which it knows is considered illegal by the parties affected as well as by a responsible appellate court.

In this posture of the case, one might well inquire of what use is the remedy of declaratory judgment if it is not available to relieve against the hazards and uncertainties confronting all parties to this suit and available at a time when declaration without injunction should dispose of the controversy (cf. Opinion, p. 8). Every administrative act which could contribute to or cause the *present uncertainty* is a completed administrative act and the party affected by those acts has done all in its power to bring about a correction through administrative action before resorting to litigation.

We respectfully submit that when a surgeon has wrongly diagnosed gangrene as affecting the tip of a lower extremity and has indicated amputation at the knee, medical science would not look with favor upon his objection to consultation with the internist nor regard his answer as complete and satisfactory if he said that for the moment he would amputate at the ankle and keep the other operation under advisement.

Grounds IV and V of the Petition do not require elaboration.

Dated: March 29, 1948.

Respectfully submitted,

SAMUEL B. STEWART, JR.,

LUTHER E. BIRDZELL,

Attorneys for Respondent.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

March 29, 1948.

**SAMUEL B. STEWART, JR.,
LUTHER E. BIRDZELL.**

SUPREME COURT OF THE UNITED STATES

No. 101.—OCTOBER TERM, 1947.

Marriner S. Eccles, Ronald Ransom,
M. S. Szymczak, et al., Petitioners,

v.

Peoples Bank of Lakewood Village,
California.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 15, 1948.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding under the Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. § 400. Its aim is to have declared invalid a condition under which the respondent became a member of the Federal Reserve System. The California State Banking Commission authorized the establishment of the respondent provided it obtained federal deposit insurance. This requirement could be met either by direct application to the Federal Deposit Insurance Corporation or through membership in the Federal Reserve System. §§ 12 B (e) and (f) of the Federal Reserve Act, 48 Stat. 162, 170, 49 Stat. 684, 687, 12 U. S. C. §§ 264 (e) and (f). Respondent sought such membership but its application was rejected. The promoters of the Bank, having requested the Board of Governors of the Federal Reserve System to reconsider the application for membership, were advised that favorable action depended on a showing that the Transamerica Corporation, a powerful bank holding company, did not have, nor was intended to have, any interest in this Bank. Having been satisfied on this point, the Board of Governors granted membership to respondent subject to conditions of which the fourth is the bone of contention in this litigation.

This condition reads as follows:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation, or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of the usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

The Board of Governors gave the respondent this explanation for the condition:

"The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status."

Some time later, in 1944, Transamerica, without prior knowledge of the respondent, acquired 540 of the 5,000 shares of its outstanding stock. The Bank duly advised the Board of Governors of this fact, but requested that it be relieved of Condition No. 4. This, the Board of Governors declined to do. Then followed this action, in the United States District Court for the District of

Columbia, against the Board of Governors for a declaration that Condition No. 4 was invalid and for an injunction against its enforcement. A motion by the defendants to dismiss the complaint, in that it failed to set forth a justiciable controversy, was denied. 64 F. Supp. 811. The defendants answered, claiming that the Bank's acceptance of membership barred it from questioning the validity of Condition No. 4, and that in any case the condition was valid, and moved for judgment on the pleadings. The Bank, having filed a number of affidavits, moved for summary judgment. The District Court, in an unreported opinion, held that the Bank was bound by the condition on which it had accepted membership in the Federal Reserve System, and gave judgment for the defendants. The Court of Appeals for the District of Columbia, one judge dissenting, reversed. It rejected the defense of estoppel and sustained the validity of the condition "only as a statement that, if the Board of Governors should determine, after hearing, that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way, it may require the bank to withdraw from the Federal Reserve System." 161 F. 2d 636, 643-44. Accordingly, it remanded the case to the District Court for entry of a judgment construing Condition No. 4 to such effect. Since this ruling involves a matter of importance to the administration of the Federal Reserve Act, we brought the case here. 332 U. S.—.

Condition No. 4 provides for withdrawal from membership in the Federal Reserve System, for violation of its provisions, "within 60 days after written notice from the Board of Governors" Section 9 of the Federal Reserve Act authorizes the Board of Governors to revoke

the membership status of a bank "after hearing."¹ If the case contained no more than the foregoing elements, three questions would emerge:

(1) Was this action premature, brought as it was before the Board of Governors commenced revocation proceedings?

(2) If not, could the respondent attack the validity of a condition on the basis of which it had been accepted, and had enjoyed, membership? Compare *Fahey v. Maloney*, 332 U. S. 245, 255.

(3) If so, did the Board of Governors have power to impose the condition as a means of guarding against acquisition by Transamerica of an interest in respondent?

However, with due regard for the considerations that should guide us in rendering a declaratory judgment, the record as a whole requires us to dispose of the case without reaching any of these questions.

Extended correspondence between Marriner S. Eccles, the then Chairman of the Board of Governors of the Federal Reserve System, and A. P. Giannini, Chairman of the Board of Directors of Transamerica, together with the testimony of Eccles before the House Committee on Banking

¹ "If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section." 38 Stat. 251, 260, as amended, 46 Stat. 250; 251, 49 Stat. 684; 704, 12 U. S. C. § 327. See also § 5 of the Administrative Procedure Act, 60 Stat. 237, 239, 5 U. S. C. § 1004.

and Currency, set forth the reason for the Board's insistence on the fourth condition. The Board sought to block "acquisition by Transamerica of stock in independent unit banks, especially when it constitutes a means of evading the requirements of the Federal agencies who will not permit its banks to establish additional branches." Hearings before Committee on Banking and Currency, House of Representatives, on H. R. 2634, 78th Cong., 1st Sess., p. 15. The Board was concerned not that Transamerica might purchase some shares of independent banks for the ordinary purposes of investment, but that it would buy into banks in order to acquire control, and thereby turn banks, though outwardly independent, into parts of its own banking network. The Board of Governors was therefore carrying out the policy underlying Condition No. 4 when it formally disavowed any intention to invoke that condition against respondent merely because of acquisition by Transamerica of an interest in the Bank, with no indication of subversion of its independence.² This action by the Board was taken after it had satisfied itself that Transamerica's holding did not affect the Bank's control. The Bank had vigorously insisted on its continued independence, in urging upon the Board the harmlessness of Transamerica's ownership of some of the Bank's stock, and the Board, upon inde-

² The following is an extract from the minutes of a meeting of the Board on January 28, 1946:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation."

pendent investigation found such to be the fact. Accordingly, the Board concluded that "the public interest" called for no action.

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. *Brillhart v. Excess Insurance Co.*, 316 U. S. 491; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 297-98; H. R. Rep. No. 1264, 73rd Cong., 2d Sess., p. 2; Borchard, *Declaratory Judgments* (2d ed. 1941) pp. 312-14. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance. And so we turn to the facts of the case at bar. The Bank has always insisted that it is independent of Transamerica; the Board of Governors has sustained the claim. The Bank stands on its right to remain in the Federal Reserve System; the Board acknowledges that right. The Bank disclaims any intention to give up its independence; the Board of Governors, having imposed the condition to safeguard this independence, disavows any action to terminate the Bank's membership, so long as the Bank maintains the independence on which it insists. What the Bank really fears, and for which it now seeks relief, is that under changed conditions, at some future time, it may be required to withdraw from membership, and if this happens, so the argument runs, the Comptroller of the Currency, one of the Directors of the Federal Deposit Insurance Corporation, has agreed with the Federal Reserve Board to refuse any application by the Bank for deposit insurance as a non-member.

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Thus the Bank seeks a declaration of its rights if it should lose its independence, or if the Board of Governors should reverse its policy and seek to invoke the condition even though the Bank remains independent and if then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.

It appears that the respondent could, if it wished, protect itself from the loss of its independence through adoption of by-laws forbidding any further sale or pledge of its shares to Transamerica or its affiliates. See California Corporations Code, L. 1947, c. 1038, § 501 (g).³ To this the Bank replies that even if its independence is maintained, the Board of Governors may change its policy, and seek enforcement of Condition No. 4 whether or not such enforcement is required by "the public interest" in having independent banks, which the condition

³ "501. The by-laws of a corporation may make provisions not in conflict with law or its articles for:

"(g) Special qualifications of persons who may be shareholders, and reasonable restrictions upon the right to transfer or hypothecate shares."

Likewise, the shareholders, or such of them as chose to, could presumably bind themselves not to sell or pledge to Transamerica, and by noting this agreement on their certificates could bind their transferees. Cf. *Vannucci v. Pedrini*, 217 Cal. 138.

now serves. Such an argument reveals the hypothetical character of the injury on the existence of which a jurisdiction rooted in discretion is to be exercised. In the light of all this, the difficulties deduced from the present uncertainty regarding the future enforcement of the condition, possibly leading to uninsured deposits, are too tenuous to call for adjudication of important issues of public law.* We are asked to contemplate as a serious danger that a body entrusted with some of the most delicate and grave responsibilities in our Government will change a deliberately formulated policy after urging it on this Court against the Bank's standing to ask for relief.

A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process. But, as we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and therefore equally inappropriate for a declaration of rights. This is especially true in view of the type of proof offered by the Bank. Its claims of injury were supported entirely by affidavits. Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment. Modern equity practice has tended

* The bank asserted, in its affidavits, not that lack of confidence had deterred depositors, but that deposits had been so heavy that capital expansion was in order, but might be disadvantaged by fear of prospective investors to risk personal assessment if deposits were uninsured.

away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies. Equity Rule 46 forbade such practice save in exceptional cases. See *Los Angeles Brush Mfg. Corp. v. James*, 272 U. S. 701; cf. Federal Rule of Civil Procedure 43 (a). Again, not the least of the evils that led to the Norris-LaGuardia Act was the frequent practice of issuing labor injunctions upon the basis of affidavits rather than after oral proof presented in open court. See Amidon, J., in *Great Northern R. Co. v. Brosseau*, 286 F. 414, 416; Swan, J., in *Aeolian Co. v. Fischer*, 29 F. 2d 679, 681-82.

Where administrative intention is expressed but has not yet come to fruition (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324), or where that intention is unknown (*Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 429-30), we have held that the controversy is not yet ripe for equitable intervention. Surely, when a body such as the Federal Reserve Board has not only not asserted a challenged power but has expressly disclaimed its intention to go beyond the legitimate "public interest" confided to it, a court should stay its hand.

Judgment reversed.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 101.—OCTOBER TERM, 1947.

Marriner S. Eccles, Ronald Ransom,
M. S. Szymczak et al., Petitioners,

v.

Peoples Bank of Lakewood Village,
California.

On Writ of Certio-
rari to the United
States Court of
Appeals for the
District of Co-
lumbia.

[March 15, 1948.]

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, dissenting.

In order to get admission into the Federal Reserve System, the respondent was required to put into its charter a provision which was allegedly beyond the power of the Board of Governors of the System to require. It seems obvious that the requirement was a restriction on the market for the respondent's stock and therefore detrimental to the conduct of its business, a continuing threat of the Board to exclude respondent from the benefits of the System.

Respondent desired to be free of what it regarded as an illegal requirement. The Board of Governors has not agreed that it will never enforce the prohibition but holds it as a threat to force the respondent to resign from the System upon acquisition of control by those deemed undesirable by the Board.

Certainly, as I see it, there is not only the possibility of future injury but a present injury by reason of the threat to the marketability of respondent's stock. It may have a substantial bearing upon the willingness of customers to establish banking relations with it, especially major relationships looking toward long and close associations of interests. It requires no elaboration to con-

vince me that the threat is a real and substantial interference by allegedly illegal governmental action. As that threat has taken a definite form by the enforced agreement for withdrawal, we have not something that may happen but a concrete written notice requiring withdrawal by this respondent from the System on the happening of a fact which is contrary to the Board's idea of the public interest. Whether the Board's idea of a legitimate public interest is correct is the very point at issue.

In such circumstances there is a justiciable controversy, the claim of a right and a present threat to deprive a particular person of the right claimed. The damage from its actual or threatened enforcement is, of course, irremediable. Any bank would be seriously injured by even an effort to oust it from the System. This gives jurisdiction under the Declaratory Judgment Act. Judicial Code § 274d.

This Court has discretion to refuse to consider a petition for a declaratory judgment and an injunction to stop a threatened or existing injury. *Federation of Labor v. McAdory*, 325 U. S. 450, 461. That discretion is not unfettered. *Altwater v. Freeman*, 319 U. S. 359, 363. There is no difference between declaratory suits involving an equitable remedy and other equity suits. Where an actual controversy with federal jurisdiction exists over the legal relations of adverse parties, discretion usually cannot properly be exercised by refusing an adjudication. *Meredith v. Winter Haven*, 320 U. S. 228; cf. *Bell v. Hood*, 327 U. S. 678. Unusual circumstances, not here present, such as other pending suits, *Brilthart v. Excess Insurance Co.*, 316 U. S. 491, or supersession of state authority, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, sometimes justify refusal of relief.

Under the facts of this case, however, it seems improper to refuse an adjudication at this time. If governmental power is being unlawfully used to constrain respondent's operation of its business, respondent is entitled to protection, now. See *Columbia Broadcasting System v. United States*, 316 U. S. 407, a case where prematurity was clearer than here.

I would decide this case on the merits.